United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

B 4021

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CASE NO. 75-4021

NATIONAL ASSOCIATION OF INDEPENDENT
TELEVISION PRODUCERS AND DISTRIBUTORS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

AMERICAN BROADCASTING COMPANIES, INC.,
COLUMBIA BROADCASTING SYSTEM, INC.,
NATIONAL BROADCASTING COMPANY, INC.,
WESTINGHOUSE BROADCASTING COMPANY, INC.,
WARNER BROS. INC., ET AL.,
NATIONAL COMMITTEE OF INDEPENDENT
TELEVISION PRODUCERS, ET AL.,
Intervenors.

ON PETITION FOR REVIEW OF SECOND REPORT AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether exempting categories of programs from the Prime Time Access Rule is consistent with the First Amendment and 47 U.S.C.§326 of the Communications Act?

2. Whether the Federal Communications Commission, in establishing rules to exempt programing categories from the Prime Time Access Rule, has illegally delegated its statutory obligation to make public interest findings?

3. Whether the Commission's amendments to the Prime Time Access Rule are rationally based in the record of the inquiry proceeding and established Commission policy?

STATEMENT OF THE CASE

The petitioner, the National Association of Independent Television Producers and Distributors (N.A.I.T.P.D.), seeks review, pursuant to 47 U.S.C.§402(a), of those portions of the Federal Communications Commission's Second Report and Order (F.C.C. 75-67, released January 17, 1975, 40 Fed. Reg. 40001 (1975)) reaffirming the Prime Time Access Rule (47 C.F.R.§73.658(k)), which permit selective non-compliance therewith by regulated entities depending solely upon the subject matter of their programs. Specifically, N.A.I.T.P.D. challenges sub-paragraphs (1) and (4) of 47 C.F.R. §73.658(k) in their entirety and sub-paragraph (2) of 47 C.F.R. §73.658(k) insofar as it expands upon the similar exemption set forth in the same sub-paragraph of the original Prime Time Access Rule. 1/

The background and purpose of the Prime Time Access Rule have twice been detailed by this Court, once in affirming the rule 2/

1/ The full texts of the original, presently effective rule and of the proposed new version are reproduced as Appendices A and B to this brief, and appear at pages A1 and A2. All published Commission documents are cited herein to the F.C.C. reports; the Second Report and Order, which commences at page 084 of the Joint Appendix (J.A.084), is cited by its internal paragraph numbers only.

2/ Mt. Mansfield Television, Inc. v. F.C.C., 442 F.2d 470 (2d Cir. 1971) affirming Report and Order: Network Television Broadcasting, 23 F.C.C.2d 382, reconsideration granted in part and denied in part, 25 F.C.C.2d 318 (1970).

and once in remanding a previous effort to modify the rule. [3/] "Simply stated," as the Court explained in its second decision:

> [T]he rule prohibited television stations in the fifty largest metropolitan areas from broadcasting network programs in more than three of the four evening hours in which most people watch television ('prime time'). To assure that the remaining hour ('access time') would be available for independently created programs, the rule prohibited the showing of feature films recently televised within the market or 'off-network' programs (previous network programs, or 'reruns') during access time. [2/]

2/ To supplement PTAR the Commission also enacted the 'financial interest' and 'syndication' rules, 47 C.F.R.§73.658(j) (1973). These rules prohibit each network from acquiring any financial interest in a program not produced solely by that network and from syndicating programs for non-network or foreign television. N.A.I.T.P.D. v. F.C.C., supra, 502 F.2d 249, 251.

The problem necessitating adoption of the Prime Time Access Rule was "the stranglehold the three major networks had acquired over prime time programing," a stranglehold which gave them "virtually exclusive power to determine what millions of television viewers could watch every evening." Id. In short, the rule and its two companion regulations, the Syndication and Financial Interest Rules, (47 C.F.R.§73.658(j)), were designed to replace monopoly with effective competition, itself a function so basic as to have led to initial creation of the Commission, [4/] in the interest of enforcing the paramount right of the public to "the widest possible dissemination of information from diverse and antagonistic sources."

3/ N.A.I.T.P.D. v. F.C.C., 502 F.2d 249 (2d Cir. 1974) remanding Report and Order: In the Matter of Consideration of the Operation of, and Possible Changes in the "Prime Time Access Rule," 44 F.C.C.2d 1081, reconsideration denied, 46 F.C.C.2d 1013 (1974).

4/ F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940); Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 479; 47 U.S.C.§§303,303(g).

Associated Press v. United States, 326 U.S. 1, 20 (1945); Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367, 390 (1969); Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 477.

The subsequent reexamination of the Prime Time Access Rule which led both to the remanded 1974 Report and Order, supra, and to the Second Report and Order now on review, was designed to ensure that the rule, on the basis of actual experience, was achieving this intended objective and to the extent, if any, that it was not, to adopt appropriate remedial modifications. The Commission's first reexamination resulted in reduction of access time from 14 to a maximum of 6 half hours per week with further reductions being provided for by various exemptions.

N.A.I.T.P.D. and various other parties challenged the rule changes on the grounds that they increased network dominance; violated the First Amendment and the licensing scheme of the Communications Act; and bore a September 1974 effective date which was independently unreasonable in light of the Commission's continuing intent to encourage independent syndication. This Court remanded under injunction against effectuation before September 1975; dismissed without prejudice the petitions for review of the merits of the rule changes; and suggested that the Commission utilize its further opportunity to give consideration to the economic factors involved in the rule's operation, including soliciting the views of the Justice Department, and to the views of public interest groups representing local television viewers,

the "primacy" of whose "interests ... in the F.C.C.'s exercise of its powers" has been "repeatedly stressed" by the Supreme Court. N.A.I.T.P.D. v. F.C.C., supra, 502 F.2d 249, 257.

On July 17, 1974 the Commission responded to the remand order by issuing a Further Notice Inviting Comments, 47 F.C.C.2d 930 (1974) on the matters raised in the remand order and from the kinds of parties suggested by the Court, stating that:

> ... As a result of this inquiry, our decision could remain essentially unchanged, the original rule could be retained, some resolution between these alternatives could be reached, further modifications could be made resulting in less 'cleared' time, or conceivably the rule could be repealed. Whatever the Commission decides regarding the substance of the rule, the question of the effective date must also be considered, and therefore, comment is also invited as to the date each of the possible alternatives should become effective. 5/
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> Further Notice Inviting Comments, supra, 47 F.C.C.2d 930, 931 (footnote omitted).

5/ On July 22, 1974, N.A.I.T.P.D. sought clarification of the nature of the investigation intended by the Commission and specifically requested that the Commission act immediately to set an effective date, by tying it to the commencement of a season beginning a specified number of months (N.A.I.T.P.D. suggested 16) subsequent to final adoption of whatever changes ultimately were made. N.A.I.T.P.D. noted that "[w]hile it is manifest that so long as partial or total rule revocation continues a daily probability, the matter of effective date alone is insufficient to replace chaos with stability, it is at least ... a first step which can be taken without regard to the resolution of any other question ... (J.A.057, 074).

By order released on August 9, 1974 the Commission ruled that since the question of an appropriate effective date "is one of the matters ... for comments ... it would be premature and inappropriate for us to set forth any final view at this time." Memorandum Opinion and Order Concerning Clarification, 48 F.C.C.2d 206, 207 (1974).

The post-remand record included the further comments of almost 50 parties, including the Department of Justice and 17 public interest groups, representing listeners generally, local audiences, minorities, women and special interest listener groups, all but one of whom strongly endorsed continuation of the Prime Time Access Rule without "waivers or other relaxations" [6/] because it expanded opportunity for local programs and programs responsive to community needs and for listener involvement and minority and female representation in both the programing and the broadcasting process. On consideration of this record and further examination of the record which had been before it when it adopted the remanded 1974 modifications of the rule, the Commission "decided to return" to the rule as originally enacted "except for codification of certain waiver practices" and for "network or off-network programming which is designed for children, public affairs or documentary programs, and different provisions as to feature films." [7/]

In returning to the original rule, the Commission strongly endorsed the rule's operational achievement of its original theoretical goals. The Commission concluded that under the rule's

6/ Second Report and Order, supra, paragraph 10.

7/ Second Report and Order, supra, paragraph 13. The different provisions for feature film were simply a determination to treat all movies previously broadcast on networks -- whether produced for television or for theatrical exhibition -- like all other off-network product. N.A.I.T.P.D. does not challenge this revision, which has the apparent virtues of simplicity and logic, and which is consistent with the underlying principle of regulation by program source rather than program type which actuated the Commission when it originally adopted the Prime Time Access Rule.

aegis, "network control over station time ... is reduced ... and certain public advantages have resulted," including stimulation of local program activities, [8/] identified as "one of the really significant benefits from the rule ... and ... one of the principal reasons for retaining it in a form close to PTAR I"; [9/] the production in syndication of popular programs cancelled by networks (such as Lawrence Welk and Hee-Haw); and station retention of almost 70% of the revenues from access shows as opposed to the approximately 30% retained when their networks program the time, money which provides increased support for local programing efforts of the sort which have led public interest groups to applaud the rule. Second Report and Order, supra, paragraph 15. The Commission was also influenced by the development of a "body of new syndicated programing, which independent stations may use as well as affiliated stations" and which also "provide support for the development of new programming approaches and ideas." Second Report and Order, paragraph 16.

From an economic standpoint, the operation of the Prime Time Access Rule was deemed beneficial in that it provided access to non-national advertisers, among them small local businesses, especially those owned by members of minority groups, as well as to national advertisers who prefer spots to network sponsorship. The Commission also noted the increase in public service pro-

8/ Second Report and Order, supra, paragraph 15.

9/ Second Report and Order, supra, paragraph 60.

graming by ABC, long the weakest network economically, as a result of its improved competitive position. The Commission also cited the "increased number of producers active in prime time" as a result of the "emergence of successful distributors who are able to finance their own and others' production of network and non-network programs, e.g., Worldvision and Viacom." Second Report and Order, paragraph 17. With respect to the question whether the Prime Time Access Rule has led to greater diversity and quality in programs, an objective eschewed as improper and unattainable when the rule was adopted, 10/ the Commission found that

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10/ In its original Report and Order (Network Television Broadcasting, supra, 23 F.C.C.2d 382, 397) the Commission stressed that "it is not our objective or intention to ... promote the production of any particular type of program -- whether or not it be included within the present category of quality high cost programs." On the contrary, "the types and cost levels of programs which will develop from opening up evening time must be the result of the competition which will develop ...," (Id.) a self imposed restraint cited by this Court in affirming the Commission. Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 480. While "the history of television programming indicates that" the Commission's action in "removing the three-network funnel" would "result in a greater diversity among individual programs," such a result would be strictly left to "the decision of the marketplace" since "as we have repeatedly emphasized, it is not our intention to set up standards of 'diversity and quality' in television programming," standards which in any event would be unattainable in a commercial television system. Network Television Broadcasting, supra, 23 F.C.C.2d 382, 411.

In sum, in adopting the Access Rule the Commission was at pains to ensure that it did its intended job of removing "a detriment to the public's ability to receive diverse programming," Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 478; National Broadcasting Co. v. United States, 319 U.S. 190, 226-227 (1943), without itself reimposing that very same detriment through substitution of a Commission restraint for that previously imposed by the networks.

And in affirming that action this Court made very clear that the Commission's power was limited to opening the market, that that power was a "duty" as well, and that the purpose of doing so would be defeated were the Commission itself thereupon impermissibly to "become a censoring agency" by dictating how or with what or by whom that opened time was filled. Mt Mansfield Television, Inc., v. F.C.C., supra, 442 F.2d 470, 480.

"the rule has not yet been fully tested"; that it cannot be determined now what kinds of programs will eventuate with "time and a more favorable climate"; and that the uncertainties which its regulation, including this proceeding, instigated concurrent with the rule's full effectiveness, has produced, "have undoubtedly had a discouraging effect on investment in the development of programs other than those most easily produced and readily saleable." Second Report and Order, supra, paragraph 18.

Nevertheless, the Commission determined to adopt the exemptions here challenged, extracting from the foregoing conclusions only the negative judgment that the record provided no "basis for action at this time beyond that taken herein." Id. Nor did the Commission come to grips with the question whether involvement in program content is permissible in and of itself, apparently regarding the matter as dependent not upon the degree of involvement but only upon the amount of time affected by that involvement. Thus it never explained why the programatic preferences which it expressed in the exemptions were permissible but did suggest that the very same action might be prohibited if it resulted in "repeal or substantial abridgment of the rule," and question whether, in such a case, appropriate standards could be formulated or applied and whether if so their retroactive application without "public input" would be permissible:

> Perhaps more fundamental is the question of to what extent repeal or really substantial abridgement of the rule would be justified on the basis of a Commission evaluation of such matters. Action on a basis like this has the danger of reflecting the Commission's per-

> sonal predilections and prejudices. A related question is, assuming such an inquiry is appropriate, what standards should be used, and whether they should be applied, in a sense, retroactively and without any public input into their formulation. For example, assuming that 65.6% of access entertainment time devoted to game shows is undesirable, what about 41.2% of network prime time devoted to crime-drama shows of various types? If we look at the concentration of game shows in certain markets such as Cincinnati or Albany, must we not look also at three network crime-drama shows opposite each other on Wednesdays at 10 p.m.?
>
> Second Report and Order, supra, paragraph 20.

Apparently finding even these tentative reservations concerning the censor's role without application to its own projected action, the Commission reached its decision "to permit an exemption for 'programs designed for children' and 'public affairs programs or documentaries.'" The Commission did not define "public affairs." As to the other two categories it explained that:

> The definition of children's programming is 'programs primarily designed for children aged 2 through 12.' The term documentary program is defined as 'programs which are non-fictional and educational or informational, but not including programs where the information is used as part of a contest among participants in the program, and not including programs relating to the visual entertainment arts (stage, motion pictures or television) where more than 50% of the program is devoted to the presentation of entertainment material itself.' It should be noted that the exemption is different from that in PTAR II in two respects: (1) it refers to 'children's programming' without limiting it to children's 'specials'; and (2) the definition of documentaries is designed to exclude (in addition to game shows) documentaries about the entertainment world more than half of which are devoted to showing entertainment material. 23/

23/ This limitation on the exemption is designed to deal with a possible loophole -- the presentation of substantial amounts of what is really regular entertainment programming in the form of a documentary concerning the entertainment industries. If a program of this sort is to be presented under the exemption, it must be at least 50% devoted to material other than the entertainment material itself.

Second Report and Order, supra, paragraph 28.

The Commission offered no affirmative explanation of who would decide what programs came within either of these definitions or who would decide what constituted public affairs or how. It did, however, indicate that its own role in the decision making process would be significant. Indeed it made a certain number of more or less specific declaratory rulings in the Report and Order, observing at one point that "we would not necessarily regard all programs so considered by some as falling within the scope of this exemption" [11/] and at another that "in the networks' regular prime time schedules starting in January 1975, it appears that only NBC's Disney program would come within this exemption," [12/] a particularly interesting selection for specificity since in an earlier paragraph ABC's access program Rainbow Sundae was referred to, perhaps ominously, as "described by ABC as a children's program." [13/] Second Report and Order, supra, paragraph 30, footnote 24.

The Commission also made clear the fact that its participation in the station and network programing process would not end with interpretation of the definitions adopted in the exemptions. On

11/ Second Report and Order, supra, paragraph 30.

12/ Second Report and Order, supra, paragraph 31, footnote 25.

13/ Matters are further complicated by the fact that when the Commission last year returned time on Sunday to the networks because 7:00-8:00 Sunday is "traditionally a popular family network entertainment period" (1974 Report and Order, supra, 44 F.C.C.2d 1081, 1132), it used Disney as an example of a family program as distinct from a children's program. "Opposition to Motions for Stay," filed by the Commission in Case No. 74-1168, page 9; Commission's Brief in Case No. 74-1168, page 22.

the contrary, erroneous determinations by stations or networks would be fraught with consequences. The Commission indicated that "we assume that [the public affairs] exemption will not be utilized to effectively undercut the basic rule;" [14/] expressed its "expectation that networks and licensees will not abuse [the children's program] exemption"; [15/] noted that "the stripping of off-network material on the theory that it is a program designed for children or a documentary program, would not be regarded as consistent with the spirit or objectives of the rule"; [16/] and concluded with the following instructions:

> ... We caution networks to avoid any incursion into this period unless there are compelling public interest reasons for so doing. If there are extensive deviations from these precepts, the exemption may have to be re-visited.
>
> In acting herein to permit an increase of network programming of certain types, we are only opening up an option for licensees to use such additional network material if, in light of their programming judgments as licensee-trustees meeting the needs, tastes, interests and problems of their coverage areas, they deem it appropriate to do so. Our purpose is to make available to licensees programming which, to some extent, was removed from prime time or caused to be run at a much later hour. There is intended no requirement, or even a suggestion, that such additional network

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14/ Second Report and Order, supra, paragraph 32.

15/ Second Report and Order, supra, paragraph 31.

16/ Second Report and Order, supra, paragraph 34, footnote 29.

> programming should be carried in order for a licensee to carry out properly his programming obligations. 17/
>
> Second Report and Order, supra, paragraphs 34-35.

This caution against use of the exemption absent "compelling public interest reasons for so doing" and the further insistence that "there is intended no requirement, or even a suggestion, that such additional network programming should be carried in order for a licensee to carry out properly his programming obligations," must presumably be read by networks and licensees against the background of the Commission's explanation for adoption of the exemption in the first place. That explanation is as follows:

> We find that the prime time access rule has had the effect of inhibiting certain kinds of programming which we believe are entitled to special treatment so as to encourage their timely presentation in prime time. We believe that the importance of these

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17/ In a footnote (paragraph 35, footnote 30) the Commission dismissed N.A.I.T.P.D.'s observation that the Commission itself has consistently held the competition provided to first run syndicated shows by network and off-network programs to be "insurmountable" (Network Television Broadcasting, supra, 23 F.C.C.2d 382, 386) and that this fact alone rendered both the Prime Time Access Rule and the off-network rule necessary. "This proposition," said the Commission, "is obviously not literally true. There has always been, and still is, pre-emption of network prime time material; and during the first year of the rule, when off-network material was permitted in access time, only 23% of such time was devoted to it." Elsewhere in the Second Report and Order, however, the Commission noted that there are actually less station preemptions of network time under the Prime Time Access Rule than before the rule, although it dismissed this factor as evidence of increased network dominance of affiliates since such preemptions have in any case always been "small." Second Report and Order, supra, paragraph 23. And as to the fact that "only" one quarter of access time was swallowed up by off-network shows in the rule's first season, the Second Report and Order had elsewhere found (paragraph 18) that this fact rendered the rule's first season inadmissible as evidence of the rule's operational success: " This [23% of access time devoted to off-network in the rule's first year], over 450 half-hours, when taken together with the amount of time then and now devoted to news and other long-established usages, could well have been a formidable obstacle. ..."

> kinds of programming outweighs any concern as to its source, whether locally produced, first-run syndicated, network or off-network, and that the public interest is better served by allowing children's programming, public affairs programs or documentaries to appear to some extent in cleared time regardless of their source, 18/ and that stations should not be prohibited from also presenting three hours of other network or off-network prime time programming. The viewing public has a right to these types of programming, and the prime time access rule, by its operation, has had the effect of limiting this right.
>
> Second Report and Order, supra, paragraph 29.

The Commission gave no reason for attributing the paucity of the desired programs at 7:00 p.m. to the Prime Time Access Rule rather than the unilateral and unreviewed network decision never to program the 7:00-8:00 p.m. hour. Its only reference to the observation of many parties that any problem could be solved without impairing the rule by such other means as requiring clearance of a later time slot for access, at least on some days of the week, or imposing a requirement on the networks that if certain program types are offered in prime time they be offered in the first hour, is the assertion that such solutions "would involve the Commission too deeply in day-to-day programming and scheduling decisions." Second Report and Order, supra, paragraph 40.

Attacks on the legality of the exemption procedure must fail, held the Commission, because "the exemptions have been

18/ This disclaimer of interest in source appears to be at odds with the finding that there is already a great deal of local access public affairs programing, representing "one of the important benefits of the rule" (as well as a great deal of such material from networks both in and out of prime time). Indeed the Commission specifically justifies the public affairs exemption because "the rule constitutes an inhibition on the networks' exercise of this highly important part of their activities...." Second Report and Order, paragraph 32.

drawn as narrowly as possible consistent with the interest of the public discussed above." Second Report and Order, supra, paragraph 47. As to any First Amendment problem:

> We do not believe that permitting the carriage of programs in the categories exempted raises any questions of a Constitutional nature. We state again that the purpose of these exemptions is to facilitate the carriage of programs which the rule has had the effect of limiting. If we did not believe that we had the authority to make these modifications, we would then give further consideration to the advisability of continuing the rule.
> Second Report and Order, supra, paragraph 48.

With specific respect to the exemption for overlong sporting events, challenged by public interest groups and access producers alike, 19/ the Commission noted that although "the present situation is by no means entirely satisfactory and some of the citizens' groups and other proponents of the rule urge us to preserve access time by requiring either a give-back or a roll-back by the networks in these cases, we are not persuaded that this is a serious enough problem to warrant a basically different approach." Second Report and Order, supra, paragraph 51. It also found that the 1975 season has already seen both "a high incidence of runovers" in football and "some abuses." However the Commission proposed no action either to prevent future abuses or to deal with past ones, simply observing, without explaining why, that:

19/ The impact of this exemption is already clear, since waivers over opposition have been in effect now for several years. The opposition of public interest groups represents not only a consistent opposition to the principle of retreats from the Prime Time Access Rule but also recognition of a particularly painful problem caused by the fact that the majority of both runovers and station public interest programs occur at the same time: on weekends.

"We expect that in the future the networks will exercise a greater degree of care in their scheduling of sports events." Second Report and Order, supra, paragraph 52. Nor did the Commission explain either why modification of its admittedly inadequate approach to the situation would only be warranted by a more "serious" problem or what its criterion was for concluding that the problem is not now "serious." Nor did the Commission address the fact that enforcement of the Prime Time Access Rule and complete telecast of sporting events are in no way mutually exclusive and become so only through the inducement, provided by the exemption, to network recapture of access time.

The Commission's full explanation of its expansion of the on-the-spot news exemption to permit "related" material was that "this is clearly warranted to lessen any impediment to the networks' proper exercise of their journalistic function." Second Report and Order, supra, paragraph 56. The Commission did not explain why the terms of the original exemption do not constitute an improper impediment in the other rules from which the definition was derived (see, e.g., 47 C.F.R.§73.123) and in the context of which a considerable body of law has arisen to assist in any interpretive difficulties [20/] as well as to make clear the Commission's intent to resolve any ambiguities con-

20/ See, e.g., Dorothy Healey, 24 F.C.C.2d 487 (1970), affirmed, 460 F.2d 917 (D.C. Cir. 1972); Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964).

cerning compliance in favour of the regulated entity.[21] Nor did it explain how a less precise definition would lessen the jeopardy of a network endeavouring to determine whether projected material was permissible.

Finally, a September 1975 effective date, providing the same lead time as had the 1974 rule revisions, was adopted, on the ground that "the public interest dictates that the new modifications become effective at an early date because we feel that the rule as amended in this Report and Order will best serve the public interest." Longer lead time was not required, said the Commission, because "the changes adopted herein constitute less of an incursion into available access time (particularly in light of our admonition of network and licensee restraint) than would have occurred under PTAR II," and because the "parties to this proceeding have been on notice as to the specific changes adopted in the rule since November 15, 1974, the date of our Public Notice concerning staff instructions in this matter." Second Report and Order, supra, paragraph 64.

From that Second Report and Order the present petition for review is brought.[22]

21/ See, e.g., Network Coverage of Democratic National Convention, 16 F.C.C.2d 650 (1969); Mrs. J.R. Paul, 26 F.C.C. 2d 591 (1969); KMPC, Station of the Stars, Inc. 14 Fed. Reg. 4831 (1949).

22/ Time for filing petitions for reconsideration before the Commission will not expire until February 26, 1975.

I. THE COMMISSION'S PROGRAMING CATEGORIES VIOLATE THE FIRST AMENDMENT AND SECTION 326 OF THE COMMUNICATIONS ACT.

A. The Programing Categories Substitute The Commission's View As To The Value Of Particular Programs For The Views Of Broadcast Licensees.

The order adopting the presently challenged exemptions manifests an express Commission intent to rule on the content of particular programs. 23/ This intent is manifested in discussion of the application of some of the definitions and has already been effectuated in the actual terms of others. The Commission's necessary view of itself as ultimate arbiter of the applicability of the definitions to particular programs is reflected in its general observation concerning children's programs, that "we would not necessarily regard all programs so considered by some as falling within the scope of this exemption." Second Report and Order, supra, paragraph 30. This statement precedes footnote 24, listing nine programs which might indeed be "considered by some" to be children's programs. But lest the Commission's conservative observation that they are merely so "described" by others be taken to mean the Commission will not engage in definition, it hastens to

23/ The essential distinction between the challenged exemptions and those which are not here appealed is that the latter are wholly content neutral, being designed either to prevent the Prime Time Access Rule from operating as an actual bar to prime time presentation of specific material (see, e.g., 47 C.F.R.§73.658(k)(6), page A3, infra); or to allow a practice whose violation of the rule is essentially a technicality, as with 47 C.F.R.§73.658(k)(3)(page A2, infra), where violation could be avoided by interrupting the local news hour at 6:30 to insert the network news, and with the "political appearances by candidates" provision of 47 C.F.R.§73.658(k)(2), where the networks' involvement is wholly electronic and the violation an attribute only of the appearances of national candidates, since all others would make "nonnetwork" appearances.

issue a specific ruling, in the very next footnote, that "[i]n the networks' prime time schedules starting in January 1975, it appears that only NBC's Disney program would come within this exemption." Second Report and Order, supra, paragraph 31, footnote 25.

Further, insofar as concerns those exemptions for which there is no definition at all ("public affairs" and material "related to" coverage of "on-the-spot" and "fast-breaking" news), Commission intervention in aid of "interpretation" is unavoidable on the face of the matter. Such intervention will also be required insofar as the definitions are themselves couched in undefined terms: "non-fictional," "educational," "informational," "primarily designed for" (47 C.F.R.§73.658(k)(1), NOTE 2, page A3, infra); or in terms which are qualified rather than absolute, as in the case of 47 C.F.R.§73.658(k)(4) (page A2, infra), where five such terms must be interpreted conjointly in the same definition: "reasonably scheduled," "certain amount," "expected duration," "reasonably foreseeable," "under their control."

Examples of already effectuated Commission intent to regulate content are equally prevalent. The Commission's prior determination as to what kind of format a "documentary" must have to be sufficiently in the public interest to merit exemption is made part of the relevant rule. Thus even if a program meets the documentary definition it is not qualified as exempt if "the information is used as part of a contest among participants in the program," or if it is a program "relating to the visual entertainment arts ...

where more than 50% of the program is devoted to the presentation of entertainment material itself." 47 C.F.R.§73.658(k)(1), NOTE 2, page A3, infra. And in representative textual explanations of its exemptions, the Commission reiterates its 1974 determination of the "value ... to the public" of several named "documentary" programs (Second Report and Order, supra, paragraph 33); explains that its "real concern" in exempting children's programs is with "numerous" existing network specials which it likes so well it would prefer to have them rebroadcast before 8:00 p.m. hereafter and would like to "foster" more of "such material," including regular series as well, "since they may be equally beneficial to the public" (Second Report and Order, supra, paragraph 30); asserts the "obvious informational value of documentary programs," a fact to which it does not allude in the subsequent explanation that documentaries with a contest format (including necessarily the various local and national academic contests among high school and college students and such educational programs for elementary children as that now used in hundreds of schools following the format of a game show called Password) should be excluded "since game shows are plentiful in access time" (Second Report and Order, supra, paragraphs 33, 47); expresses its apparent disapproval of syndicated documentaries "like" the ones it favours, because they are "foreign" (as, by the way, is one of the cited exempt exemplars) or "easily made largely from stock footage" (Second Report and Order, supra, paragraph 38); and necessarily implies that since networks have "tremendous resources," they

should make these kinds of programs, leaving to the syndicator "drama, comedy and variety." Second Report and Order, supra, paragraphs 38, 47.

It is likewise clear from the discussion of licensee and network utilization of the exemptions that the Commission's role in the decision making process will be a continuing one, involving subsequent revision as well as prior review of licensee judgments differing from those of the Commission. Thus the Commission repeatedly refers to its "expectations" and "anticipations" and "intentions" with respect to when and why the exemptions will or should be used and warns that "[i]f there are extensive deviations from these precepts," the exemptions "may have to be revisited." Second Report and Order, supra, paragraphs 34, 35, 52. And at the recent convention of the National Association of Television Program Executives, the chief of the Commission's Office of Network Study reportedly explained that "the FCC would be monitoring stations for abuses of PTAR III" and "would not permit anything so blatant as the stripping of old Lassies." Broadcasting, February 17, 1975, page 30. See also the less specific reference in the Second Report and Order, supra, paragraph 34, footnote 29; and again, at paragraph 31, the instruction and warning that:

> It is our expectation that networks and licensees will not abuse this exception to the rule, particularly in access-period use of network or off-network programs which, while having some appeal to children, were or are not primarily designed for them but for viewing by adults, or adults and children, and for presentation of normal commercial advertising addressed to adults. The programming permitted by the exemption is intended to be only that primarily designed for pre-school and elementary school children, ages 2 to 12, taking into account their immaturity and special needs. 25/ Also, while the exemption is not limited to educational or informational material, an

important purpose of it is to promote the presentation of such material, whose importance we have recently emphasized in our Children's Television Report and Policy Statement (Docket 19142, FCC 74-1174, released October 31, 1974, 39 F.R. 39396, pars. 16, 17, 18 and 22).

25/ In the networks' regular prime time schedules starting in January 1975, its appears that only NBC's Disney program would come within this exemption. 24/

It is, then, the specific and carefully worked out design of these exemptions to encourage the incidence of specific programs and kinds of programs, and discourage the incidence of others. Such a design is in categorical opposition to the salient characteristic of the original access rule (as well as the primary provision of the proposed new rule), on the basis of which this Court found that rule proof against Constitutional attack: the rule's exclusive focus on provision of opportunity to broadcast and its specific avoidance of the whole subject of what that opportunity would produce:

> ... Congress did not want the Federal Communications Commission to become a censoring agency. But the challenged regulations are not an exercise of censorship powers. The Commission has found that the wide range of choice theoretically available to licensees is either not in fact available or is not being exercised for economic reasons. It has acted in discharge of its statutory duty in seeking to correct that situation. The Commission does not dictate to the networks or the licensees, or the independent producers whom it hopes to stimulate, what they may broadcast or what they may not broadcast; it is merely ordering licensees to give others the opportunity to broadcast. 32/

32/ 'We empha ize again that it is not our intention or objective to smooth the pat for existing syndicators or promote the production of

24/ The fact that even such detailed prior instructions will need further explanation is clear from the juxtaposition of the ban on use of programs for "adults and children" (presumably a phrase synonymous with "family" programs) with the footnote citing Disney as a children's program, in view of Disney's prior Commission classification as a family program. See page 11, footnote 13, supra.

> any particular type of program -- whether or not it be included within the present category of quality high cost programs. The types and cost levels of programs which will develop from opening up evening time must be the result of the competition which will develop among present and potential producers seeking to sell programs to television broadcasters and advertisers.' Report and Order, supra [23 F.C.C.2d 382, 397].
>
> Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 480.

Nor did the access rule eschew the subject matter of these present exemptions simply because the Commission was leaving such a step to be taken "as needed," as both the Second Report and Order and its 1974 predecessor imply. 25/ Quite aside from its own stern disclaimer, approved by this Court on review, the Commission was mindful in 1970 of the fact that it "is given no supervisory control of the programs" of its licensees. F.C.C. v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940). 26/

25/ Indeed it is rather clear from the original Notice of Inquiry and Notice of Proposed Rulemaking in this Docket, 37 F.C.C.2d 900 (1972), both that specific programatic objectives were the basic focus of this proceeding and that the Commission intended to measure the rule's achievements and tailor its future form with these ends in mind. See, e.g., 37 F.C.C.2d 900, 909, 917-18, 923.

26/ As Judge Bazelon recently observed in a lengthy concurring opinion reviewing 40 years of Commission programing policies and the First Amendment (Citizens Committee to Save WEFM v. F.C.C., 506 F.2d 252, 270 (D.C. Cir. 1974), the only element which has ever justified examination of program content is scarcity of frequencies and then only in comparative licensing cases: "[S]carcity cannot justify intrusion into programming decisions in a non-comparative situation since its factual predicate -- competing applications -- is lacking. The general intrusive nature of telecommunications itself cannot without more justify these deprivations of freedom of the press." 506 F.2d 252, 278, see also 280, note 64. (Judge Bazelon notes that Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969) is a qualification on the foregoing statement but would read it as "strictly limited to the personal attack and editorial reply rules" in light of the subsequent decisions in Columbia Broadcasting System, Inc. v. D.N.C., 412 U.S. 94 (1973) and Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). 506 F.2d 252, 278-79.) Moreover, "each regulatory action must be measured against the nature of telecommunications to ensure that the action in a particular case is justified by that nature." 506 F.2d 252, 275, note 32.

Insofar as concerns regulations like the Prime Time Access Rule, which operate directly in the area of concern to Judge Bazelon, the relevant point, here quite overlooked by the Commission, is that the different medium requires not a lessening of First Amendment freedoms but a different means of maximizing those freedoms. See Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 389-90 (1969).

It has long been the Commission's view that such government intervention in speech as is here involved is categorically impermissible because it flies in the face of the fact that "the most significant meaning of freedom of the radio is the right of the American people to listen to this great medium of communications free from any government dictation as to what they can or cannot hear .... " Report on Editorializing by Licensees, 1 Pike and Fischer R.R., Part 3, 91:201, 211 (1949). Nor was the Commission here limited to the guidance of its own wiser predecessors. The Supreme Court has left no doubt that in every respect the substance and intent of the challenged exemptions is repugnant to the First Amendment:

> ...[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. Cohen v. California, 403 U.S. 15, 24 (1971); Street v. New York, 394 U.S. 576 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 269-270 (1964), and cases cited; NAACP v. Button, 371 U.S. 415, 445 (1963); Wood v. Georgia, 370 U.S. 375, 388-389 (1962); Terminiello v. Chicago, 337 U.S. 1, 4 (1949); De Jonge v. Oregon, 299 U.S. 353, 365 (1937). To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' New York Times Co. v. Sullivan, supra, at 270.
>
> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or

> speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.
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> Police Department of Chicago v. Mosely, 408 U.S. 92, 95-96 (1972) (footnote omitted).

The fact that the procedure incident upon effectuation of the Commission's programatic objectives takes the form of categories of acceptable and unacceptable programs renders the challenged action no less impermissible. "Vagueness and the attendant evils ... are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression." Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 688 (1968). The Communications Act itself is specific that the Commission has no "power of censorship" and that "no regulation shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by radio." 47 U.S.C.§326. As the Supreme Court has observed, this careful restriction on the otherwise broad powers of the Commission makes it "clear that Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public interest obligations." Columbia Broadcasting System, Inc. v. D.N.C., 412 U.S. 94, 110 (1973). Moreover, stressed the Court, only in those cases where the paramount "interests of the public are held to outweigh the private interests of the broadcaster will government power be asserted within the framework of the Act. License renewal proceedings, in which the listening public can be heard, are a principal means of such regulation." Id.

The situation to which the access rule was a response clearly fitted in the category of conflict between private and public rights, although the private rights in question were not those of broadcasters generally, but of the three networks specifically, whose exercise of their own journalistic freedom impeded the practical ability of licensees to satisfy the paramount right of the public to access to programs from diverse and antagonistic sources. Thus while the rule to some extent limited network rights, it did so solely in order to maximize higher priority rights. See Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 480; Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 389-90 (1969).[27/] And in taking that action it had no purpose of affecting licensee journalistic policy but merely of permitting licensees the freedom to develop such policies as they deemed most in the interests of their public. Thus its action in adopting the rule was permissible for precisely the same reasons as was its inaction in the CBS case, supra, of which the Supreme Court said:

> ... [T]he Commission has not fostered the licensee policy challenged here; it has simply declined to command particular action

27/ It has been a consistent characteristic of Commission actions which to any extent limit speech that their justification and effect has been enhancing speech generally, either by the same entities being restrained (see, e.g., Lafayette Radio Electronics Corp. v. F.C.C., 345 F.2d 278 (2d Cir. 1965); California Citizens Band Ass'n, Inc. v. F.C.C., 375 F.2d 43 (9th Cir. 1967)), or in order to prevent subordination of the paramount rights of others (see, e.g., Red Lion Broadcasting Co., Inc. v. F.C.C., supra, 395 U.S. 367; National Broadcasting Co., Inc. v. United States, 319 U.S. 190 (1943); Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470; Buckley-Jaeger Broadcasting Corp. v. F.C.C., 397 F.2d 651 (1968); and see footnote 26, supra).

> because it fell within the area of licensee discretion. The Commission explicitly emphasized that 'there is of course no Commission policy thwarting the sale of time to comment on public issues.' 25 F.C.C.2d, at 226. The Commission's reasoning, consistent with nearly 40 years of precedent, is that so long as a licensee meets its 'public trustee' obligation to provide balanced coverage of issues and events, it has broad discretion to decide how that obligation will be met.
>
> Columbia Broadcasting System, Inc. v. D.N.C., 412 U.S. 94, 118-19 (1973)(Opinion of Burger, C.J.).

It is not for the Commission to perform the editorial function of the licensee in determining what programs will satisfy its trusteeship function; and even were there indicants that licensee editorial judgment were not all it should be, "[r]egimenting broadcasters is too radical a therapy for the ailment. ..." Columbia Broadcasting System, Inc. v. D.N.C., 412 U.S. 94, 126-27 (1973). Even if the Prime Time Access Rule "has not always brought to the public perfect or, indeed, even consistently high-quality [programs] ... the remedy does not lie in diluting licensee responsibility." Columbia Broadcasting System, Inc. v. D.N.C., 412 U.S. 94, 130-131 (1973).

The language of the First Amendment and of 47 U.S.C.§326 make clear that expressions of taste by government are forbidden;[28/] indeed, in turning back the concept of public access as presented in CBS, the Court was apparently actuated in part by the fear of its administration by government rather than licensees. See

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28/ Nor is this bar to be evaded simply because the expression in question is art or entertainment; "the line between the informing and the entertaining is too elusive." Winters v. New York, 333 U.S. 507, 510 (1948). See also Jenkins v. Georgia, 418 U.S. 153 (1974); Jacobellis v. Ohio, 378 U.S. 184, 191 (1964)(Brennan, J.); Roth v. United States, 354 U.S. 476, 484 (1957); Burstyn v. Wilson, 343 U.S. 495 (1952).

Columbia Broadcasting System, Inc. v. D.N.C., 412 U.S. 94, 125-26 (1973). Nor does the fact that a broadcaster's own taste or judgment may be influenced by his status as a businessman entitle that judgment to lesser Constitutional protection:

> ... [W]hile it may be true that the licensee's 'business judgment,' to use former Chairman Burch's term, is not necessarily or empirically supportive of the goal of a multitude of ideas, it is part and parcel of unrestricted freedom of the press. We would be confronted with serious First Amendment issues indeed if the Commission were ever to hold that otherwise protected [footnote omitted] speech -- broadcast to maximize advertising revenues -- loses its First Amendment protection, while protected speech -- broadcast to maximize the producer's sense of fulfillment or to maximize diversity of ideas -- remains under First Amendment protection. 17/

17/ See Hannegan v. Esquire, Inc., 327 U.S. 146, 157-58 (1946). Cf. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73 (1973)(Brennan, J. dissenting).
Citizens Committee to Save WEFM, Inc. v. F.C.C., 506 F.2d 252, 272 (D.C. Cir. 1974)(Bazelon, C.J. concurring).

However the Commission describes its action here, and despite the care with which it endeavours to reduce its instructions to "suggestions," it cannot rationalize away the Constitutional infirmities of the challenged exemptions. First Amendment freedoms "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference." Bates v. Little Rock, 361 U.S. 516, 523 (1960).

B. The Programing Categories Substitute The Commission's View As To The Value Of Particular Programers For The Views Of Broadcast Licensees.

While "to many this is, and always will be, folly ... we have staked ... our all" upon the proposition that "right conclusions are more likely to be gathered out of a multitude of tongues,

than through any kind of authoritative selection"; [29/] and that "completely unrestricted ... speech will somehow over the long run produce a multitude of ideas expressive of the culture and interest of all people, such that national political debate and artistic achievement will flourish." Citizens Committee to Save WEFM, Inc. v. F.C.C., 506 F.2d 252, 271-72 (D.C. Cir. 1974)(Bazelon, C.J. concurring); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

The present regulations leave these controlling Constitutional principles far behind, for in addition to preselecting the programs to be seen in early evening time, they preselect the programers. Indeed, the two selections are essentially symbiotic in the sense that speakers are quite openly preferred on the basis of either the Commission's opinion of what the speaker will say or its belief as to which speaker will say something best. Thus with respect to those programs granted exemption, the networks are the selected speakers. See, e.g., Second Report and Order, supra, paragraphs 30, 33, 38. But the networks are negatively preferred in other specified categories, to which end "we have drawn the exemption so as to exclude the possibility of its being used" by networks. Second Report and Order, supra, paragraph 47; see also paragraph 39. Moreover, insofar as time is returned to the networks or to licensees for off-network material, there is also a specific con-

29/ United States v. Associated Press, 52 F.Supp. 362, 372 (S.D. N.Y. 1943), affirmed, 326 U.S. 1 (1945).

dition on what they can say, in that it must come within the terms of the exemption in the first place. These preferences are all equally repugnant to the First Amendment. See Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972).

This careful limitation of eligible speakers "completely undercut[s] the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.' New York Times Co. v. Sullivan [376 U.S. 254, 270 (1964)]." Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972). Moreover, in the unique context of the present case, its Constitutional impermissibility was essentially preordained by the Commission's own prior action in adopting (if not also its concurrent action in reaffirming) the Prime Time Access Rule itself.

The Commission was created "under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcast field." F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940); National Broadcasting Co., Inc. v. United States, 319 U.S. 190, 219 (1943). Adoption of the 1934 Act did not lay that problem to rest. As this Court has observed, "the nation's policy favoring competition is one which the FCC must incorporate in regulating the broadcast media." N.A.I.T.P.D. v. F.C.C., supra, 502 F.2d 249, 256. And when the Commission adopted the Prime Time Access Rule it did so in furtherance of that controlling national policy, which was found to be jeopardized not simply economically

but also because the three network stranglehold defeated the ability of affiliates to perform their statutorily mandated function as public trustees, to the end of derogating the paramount right of the public to programs from diverse and antagonistic sources. Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 477-78, 480.

It was for the Commission to determine in the first instance whether the Prime Time Access Rule was the most appropriate way to deal with that situation, just as it would be for the Commission now to initiate additional or alternative regulations designed to achieve the same ends. However, the mere, unvarnished retreat from the Prime Time Access Rule represented by these exemptions, (designed to reach an end which is as irrelevant to the Prime Time Access Rule as it is destructive thereof and which is in any case independently unconstitutional, as already noted), is not now permissible: the enactment of these exemptions represents an affirmative government action in furtherance of an economic and ideological monopoly the Commission is under specific statutory command to replace with competition. See 47 U.S.C.§§313, 314, 303(g), 326; N.A.I.T.P.D. v. F.C.C., supra, 502 F.2d 249, 256; Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470. The Commission itself has already found that adoption of the Prime Time Access Rule was mandated for the protection of paramount First Amendment freedoms and adheres to that finding in the order under review; it follows necessarily, therefore, that the challenged exemptions, which in intent and effect diminish that protection, are themselves in violation of

the First Amendment. See Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968).

C. The Programing Categories Create The Risk Of An Enlargement Of Government Control Over The Content Of Broadcasts.

The peculiar characteristics of the broadcast medium necessitated statutory authorization of "a limited degree of Government surveillance ... [but] the Government's power over licensees ... is by no means absolute and is carefully circumscribed by the Act itself." Columbia Broadcasting System, Inc. v. D.N.C., 412 U.S. 94, 126 (1973). Thus except where there is a specific statutory grant of authority, (as in the case of 47 U.S.C.§315 and the Fairness Doctrine, reviewed in Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367, 390 (1969), where the rule in question was found permissible because it would enlarge a scarce commodity and provide uninhibited debate rather than countenance monopolization of the market), there is a specific statutory prohibition against any Commission "regulation or condition ... which shall interfere with the right of free speech .... " 47 U.S.C.§326. And further, "Congress pointedly refrained from divesting broadcasters of their control over the selection of voices .... " Columbia Broadcasting System, Inc. v. D.N.C., 412 U.S. 94, 116 (1973)(Opinion of Burger, C.J.).

In the long Congressional "purpose to maintain -- no matter how difficult the task -- essentially private broadcast journalism held only broadly accountable to public interest standards ... Congress, and the Commission as its agent, must ... preserve a

balance between the essential public accountability and the desired private control of the media." Columbia Broadcasting System, Inc. v. D.N.C., 412 U.S. 94, 120 (1973) (Opinion of Burger, C.J.). And in its efforts to preserve that balance the Commission must consider a "problem of critical importance to broadcast regulation and the First Amendment -- the risk of an enlargement of Government control over the content of broadcast discussion of public issues. See, e.g., Fowler v. Rhode Island, 345 U.S. 67 (1953); Niemotko v. Maryland, 340 U.S. 268 (1951)." Columbia Broadcasting System, Inc. v. D.N.C., 412 U.S. 94, 126 (1973).

The risk of such enlargement which the Court saw in Commission administration of the asserted right of public access for political advertisements in the CBS case pales beside the risk presented here. In that case the Court noted that:

> [T]he Commission would be required to oversee far more of the day-to-day operations of broadcasters' conduct [than is contemplated by the Act], deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired. Regimenting broadcasters is too radical a therapy for the ailment respondents complain of.
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> Under the Fairness Doctrine the Commission's responsibility is to judge whether a licensee's overall performance indicates a sustained good-faith effort to meet the public interest in being fully and fairly informed. The Commission's responsibilities under a right-of-access system would tend to draw it into a continuing case-by-case determination of who should be heard and when. Indeed, the likelihood of Government involvement is so great that it has been suggested that the accepted constitutional principles against control of speech content would need to be relaxed with respect to editorial advertisements. To sacrifice First Amendment protections for so speculative a gain is not warranted, and it was well within the Commission's discretion to construe the Act so as to avoid such a result.
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> Columbia Broadcasting System, Inc. v. D.N.C., 412 U.S. 94, 126-27 (1973).

The only presently relevant distinction between the factual situation in CBS and that presented here is that in CBS the government would have been a reluctant editor required by the nature of the right asserted to arbitrate between the broadcaster and those seeking access, whereas here the Commission has already voluntarily assumed not just the role of arbitrator but the role of arbiter. And insofar as it purports to speak for the public, it is voluntarily usurping the very same licensee editorial function it declined to perform in CBS.[30/] The present situation already represents the realization[31/] of the very risk deemed too great to entertain in CBS, where it was only a probable administrative result of recognizing an asserted public right. Here the Commission already has to some extent chosen both the speaker and the speech and its monitoring of licensee and network conduct to ensure adherence to those choices will simply involve it even more deeply in day to day editorial determinations.

30/ See, e.g., Second Report and Order, supra, paragraph 29: "We find that the prime time access rule has had the effect of inhibiting certain kinds of programming which we believe are entitled to special treatment .... We believe that the importance of these kinds of programming outweighs any concern as to its source .... "

31/ Performance of this editorial function creates another chilling spectre: because of the inherently coersive aspect of network offerings of programs to licensees, the affiliate may be placed in the position of violating the rule through an erroneous judgment by its network that a program is exempt, or through an "excessive" and therefore "abusive" production of exempt programs by its network. Nor has the licensee an escape even if it refuses its network's programs since its judgment not to broadcast exempt programs -- whether or not it can determine what they are -- is equally subject to Commission evaluation. Indeed it was the alleged failure of licensees to broadcast such programs up to the present on which the Commission grounded its adoption of the exemptions.

And balanced against this already realized risk there is no countervailing statutory or First Amendment benefit, but only the continuing probability of an enlarged government invasion of the very rights the First Amendment and 47 U.S.C.§326 were designed to preserve. It is not the business of government under our Constitutional scheme to approve, disapprove, classify, regulate or in any manner control the right of the public to receive "suitable access to social, political, aesthetic, moral and other ideas and experiences." Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969); Columbia Broadcasting System, Inc. v. D.N.C., 412 U.S. 94, 102 (1973); Fowler v. Rhode Island, 345 U.S. 67, 70 (1953). There is no other purpose to these exemptions and there is in any event no other way to administer them.

II. THE CHALLENGED EXEMPTIONS ILLEGALLY DELEGATE TO NETWORKS AND AFFILIATES THE COMMISSION'S STATUTORY OBLIGATION TO IDENTIFY THE PUBLIC INTEREST BASIS FOR DEVIATING FROM THE PRIME TIME ACCESS RULE.

The Commission's initial justification for adoption of the challenged exemptions is that the broadcast of certain programs at 7:00-8:00 p.m. is so important as to outweigh any other consideration, including the mandate to diversify program sources which is the foundation of the Prime Time Access Rule. Second Report and Order, supra, paragraph 29. Having said this much, however, it not only fails to identify the public interest basis for that judgment, but in fact affirmatively declines to make the requisite determination, leaving it to the regulated private interests to use the exemption on the basis of their own ad hoc determinations that "there are compelling public interest reasons for so doing." Second Report and Order, supra, paragraph 34. The doubly reversible deficiency of such a procedure was stressed once already by this Court in this case:

> As we have noted, Congress has directed the FCC to make the public interest paramount in regulating the broadcast media. Communications Act of 1934 §303, 47 U.S.C.§303 (1970). The Supreme Court has repeatedly stressed the primacy of the interests of the viewing public in the FCC's exercise of its powers. Thus the Commission must place the public interest above private interests in carrying out its duties, and must identify the public interest basis for its actions. N.A.I.T.P.D. v. F.C.C., supra, 502 F.2d 249, 257 (citations omitted).

Moreover, as this Court also stressed in this case, the present context is one in which "[t]hese dictates should apply with even greater force" because of the Prime Time Access Rule's "broad ... impact on the public," inasmuch as the rule "directly affects

what millions of Americans watch on television for an hour every night and, indirectly, may affect all prime time programming." Id.

Perhaps the Commission considered that in holding back from making the requisite public interest determination itself, it would evade overt substantive error. Whatever its reason for following the present illegal procedure, however, it is manifest that it also failed in its effort to "walk [the] tightrope between saying too much and saying too little" [32/] in application of the public interest standard to the area where it most clearly "invites reference to First Amendment principles" [33/] and therefore also "carries the seeds of the general authority to censor denied by the Communications Act and the First Amendment alike." [34/] Thus did the Commission not only "say too much" to avoid the reach of 47 U.S.C.§326 and the First Amendment, as noted in Argument I above, but also "too little," in omitting the crucial public interest finding on the basis of which alone any action may survive review. N.A.I.T.P.D. v. F.C.C., supra, 502 F.2d 249, 257; Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 850-52 (D.C. Cir. 1970), cert. denied, 402 U.S. 1007 (1971); WAIT Radio v. F.C.C., 459 F.2d 1203, 1207 (D.C. Cir.), cert. denied, 409 U.S. 1027 (1972); WAIT Radio v. F.C.C. 418 F.2d 1153, 1157, 1159 (D.C. Cir. 1969).

32/ Banzhaf v. F.C.C., 405 F.2d 1082, 1095 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969).

33/ Columbia Broadcasting System, Inc. v. D.N.C., 412 U.S. 94, 122 (1973).

34/ Banzhaf v. F.C.C., supra, 405 F.2d 1082, 1095.

The Commission is no more empowered "to avoid or dilute [its] statutorily imposed role as protector of public interest values" [35] by delegating that role to the regulated industry as it does here, than by "act[ing] as an umpire blandly calling balls and strikes for adversaries appearing before it," [36] as this Court gently suggested it might be doing in the 1974 rule revisions [37] which essentially drew and quartered access time and threw it to the private parties then before the Commission. Provision of "appropriate administrative control" is the essence of the Commission's mandate, [38] and if the initial judgment that broadcast of exempt program types is of paramount importance is one which does not exceed the scope of that mandate, then the duty of the agency to act upon it is inherent in the judgment itself. If the Commission had lawfully reached, and explained the public interest foundation for, its initial determination that the public interest requires broadcast of more programs of certain types, then it would have been required to "act in discharge of its statutory duty in seeking to correct that situation." Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 480.

The present action of delegating both the public interest judgment and the determination of appropriate responsive action, to

35/ Calvert Cliffs' Coordinating Committee, Inc. v. A.E.C., 449 F.2d 1109, 1119 (D.C. Cir. 1971).

36/ Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608, 620 (2d Cir. 1965).

37/ N.A.I.T.P.D. v. F.C.C., supra, 502 F.2d 249, 257.

38/ F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

the regulated private industry, to be determined in light of its own "narrow concerns," [39] is as repugnant in substance as it is in procedure. In the first place the judgment to be made involves not only a selection between the "paramount" interest of the public [40] and the interest of the regulated industry, but also a selection which contradicts the prior judgment, reflected in the Prime Time Access Rule, that absent government intervention the public interest would be subordinated to the very private interests now given the duty of determining whether the rule should be enforced. [41]

And in the second place, quite aside from the facial impropriety of delegating the shepherd's function to the wolf, there remains the fact that the Commission's is not just the exclusive duty (47 U.S.C.§303), but also the exclusive expertise, to weigh the significance of a national policy determination such as that reflected in the Prime Time Access Rule against what it has determined to be a countervailing interest. While it is certainly true that the licensee and not the Commission must determine what the needs of its public are, neither the licensee nor its network is in any position to determine either the degree of importance to be attached to the

39/ Calvert Cliffs' Coordinating Committee, Inc. v. A.E.C., supra, 449 F.2d 1109, 1119.

40/ Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367, 390 (1969). Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 480; N.A.I.T.P.D. v. F.C.C., supra, 502 F.2d 249, 257.

41/ N.A.I.T.P.D. v. F.C.C., supra, 502 F.2d 249, 251; Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 477.

access rule generally or what indirect effect a particular programing decision in derogation of the rule will have on its overall operational success.

In determining and providing what its local audience needs and wants the licensee fulfills its statutory mandate under Section 307(b) of the Act (47 U.S.C.§307(b)). The Commission alone has the means, the power or the information requisite to formulation of the pervasive regulatory scheme into which the Prime Time Access Rule fits In the Mt. Mansfield case, supra, the Commission turned back the arguments of licensees who foresaw detriment to their individual loc tations on the ground that the rule's validity must be weigh not in terms of its immediate impact on a particular litigant but in terms of its relationship to the rule's larger public interest objective, since the Commission must be allowed "to consider its total regulatory responsibilities when dealing with problems within a particular area of its jurisdiction" [42/] and artificial fragmentation of the Commission's regulatory and enforcement powers in this area would necessarily and impermissibly "frustrate a comprehensive, pervasive, regulatory scheme." General Telephone Company of California v. F.C.C., supra, 413 F.2d 390, 402.

That the subject matter of the Prime Time Access Rule necessarily contemplates a determination which is non-delegable was made

42/ General Telephone Company of California v. F.C.C., 413 F.2d 390, 400 (D.C. Cir. 1969); See also United States v. Southwestern Cable Co., 392 U.S. 157 (1968); Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 485; Carter Mountain Transmission Corp. v. F.C.C., 321 F.2d 359, 362 (D.C. Cir. 1963), cert. denied, 375 U.S. 951 (1963).

clear last year by this Court, which noted "that the nation's policy favoring competition is one which the FCC must incorporate in regulating the broadcast media." N.A.I.T.P.D. v. F.C.C., supra, 502 F.2d 249, 256. By its nature the subject matter involves judgments, as to what the status quo is, what it should be and how it can be altered, which are based upon the collective effect of all the private, local judgments which the Commission would here substitute for its own overview.

While the basic function of the licensee and the network is to look at the particular and the localized, agency rulemaking "is normally directed primarily at situations rather than particular persons" with the individual problem "normally and necessarily lost in the quantum of the greater good." 43/ If the Commission may decide and has decided that the greater good is better served by broadcast of specific programs than by the Prime Time Access Rule then it must both justify and effectuate that judgment itself. The licensee and the network are holding the telescope by the wrong end. They neither may nor can decide the greater good but in the individual exercise of those judgments which are within their power and discretion they can also collectively serve to destroy the "greater good" through their individualized judgments concerning the relative importance of the Prime Time Access Rule vis a vis particular exempt programs.

43/ Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 693 (9th Cir.), cert. denied, 338 U.S. 860 (1949).

Identification of a potential problem and delegation of its solution does not complete the Commission's "primary responsibility." "Rather, it must itself take the initiative of considering [relevant matters] at every distinctive and comprehensive stage of the [rule-making] process." Calvert Cliffs' Coordinating Committee, Inc. v. A.E.C., supra, 449 F.2d 1109, 1119. That duty is not solved by a promise to review the efforts of the industry itself to do the Commission's regulatory job. Second Report and Order, supra, paragraph 34. The challenged exemptions do no more and are reversibly deficient therefor.

III. THE COMMISSION'S ATTEMPT TO EXPAND DESIRED NETWORK AND OFF-NETWORK PROGRAMS THROUGH CONDITIONAL EXEMPTION FROM THE PRIME TIME ACCESS RULE IS UNREASONABLE.

A. Pursuit Of One Regulatory Policy At The Expense Of Another With Which It Is Not In Conflict Is Unreasonable.

1. The exemptions' factual premise -- that desired programs have diminished under the Prime Time Access Rule -- is contrary to the Commission's own factual findings.

The factual premise of the Commission's decision to adopt the challenged exemptions was that "the prime time access rule has had the effect of inhibiting certain kinds of programming which we believe are entitled to special treatment so as to encourage their timely presentation in prime time." Second Report and Order, supra, paragraph 29. Insofar as this finding refers to the availability of children's programs, documentaries and public affairs programs for use between 7:00 and 8 00 p.m. the Commission's own undisputed record findings demonstrate to the contrary. There was indeed nothing to inhibit, since the networks' own 1970 schedules

for the hour which they subsequently cleared for the access rule reflect not one single program in any of these three categories.[44/] And even assuming that the Commission deplored not a diminution but a failure to increase under the Prime Time Access Rule, its own findings still reflect to the contrary.

With respect to public affairs programs the Commission found that syndicated shows were not materializing in "significant" amounts but that "of course there is a substantial amount of such programming produced locally and presented in access time,"[45/] a fact which was not only identified as "one of the really significant benefits" for which the rule has been the "impetus" but also "one of the principal reasons for retaining [the rule] in a form close to PTAR I." Second Report and Order, supra, paragraph 60. As for network public affairs programs, the Commission seemed unsure of its position. First it stated that there were regularly scheduled public affairs programs on the networks in prime time before the rule but there are none now. However, it did not identify any such prior shows. It also found that all three networks have a "substantial amount" of news documentaries and public affairs programs in prime time although not

44/ In 1970 the first half of NBC's Wonderful World of Disney appeared within this hour -- although in some prior years it had begun at 8:00. However, until issuance of the present Second Report and Order, the Commission itself had characterized this program as "family entertainment" rather than children's fare. See page 11, footnote 13, supra.

45/ Second Report and Order, supra, paragraph 32.

on a regularly scheduled basis, which apparently is considered not as good as regularly scheduled shows. See Second Report and Order, supra, paragraph 32. In sum, there were no syndicated public affairs shows before the rule and they are now present but not in significant numbers; the rule has been the impetus for substantial increases in local public affairs programing; and the Commission's order provides no clear answer to the question whether there is more or less of such programing from network sources.

With respect to documentaries the Commission conceded their availability in large numbers in syndication, but seemed to feel that they are to be discouraged because of their place or manner of production. See Second Report and Order, supra, paragraph 38. Apparently, the goal here is to replace them with programs from the preferred network and off-network sources. While the Commission did at one point suggest that one non-regularly scheduled network documentary program was cancelled as a consequence of the Prime Time Access Rule, it admitted in a footnote that the cancellation was instead probably a result of "the timing of the court's decision [in N.A.I.T.P.D. v. F.C.C., supra] in relation to the 1974-75 season." 46/

46/ Second Report and Order, supra, paragraph 33, footnote 28. The Commission continued: "However, this does illustrate the problems involved in contraction of network prime time," a cryptic remark which both supports the inference that reintroducing network programs rather than encouraging documentaries is the issue, and suggests that the Commission blames the Prime Time Access Rule, rather than the unsuccessful effort to remake it, for the litigation whose timing is credited for the cancellation.

And finally, with respect to prime time children's programs, the Commission noted that "a very small amount" of such programing is locally produced; that "a small number" of syndicated regular series are available, of which nine are listed in the order, "although we would not necessarily regard all programs so considered by some as falling within the scope of this exemption"; that there are numerous non-regular network and off-network specials (for the latter of which, the order notes, six recent waivers have been granted); and that the only regular network program is Wonderful World of Disney (whose ambidextrous posture from year to year as "children's" and "family" programing has already been noted), which was also the only regular program before the rule.

In sum, the rule has produced some local children's program series, at least nine times as many syndicated series as there are (and were) network programs, and there continue to be many network and off-network specials in prime time, the latter of which are already in cleared time due to waivers. The nub of the Commission's "concern here is [thus] with the numerous children's special programs presented by the networks, generally starting at 8 p.m. E.T. or later under the rule" and whose rescheduling, along with that of Disney, is apparently deemed a fair exchange for all the local and syndicated programs lost thereby. Second Report and Order, supra, paragraph 30.

As the foregoing summary of the Commission's own findings makes manifest, there is not only no basis in the record, but also no basis in those portions thereof to which the Commission's order

adverts, for the factual premise of the exemptions that programs in the preferred categories have become scarcer under the Prime Time Access Rule.

2. The exemptions' justification -- that the Prime Time Access Rule has caused such a diminution -- is unexplained, contrary to the Commission's own express findings in the 1974 order in this docket, and inherently incredible.

The Commission's trip from the determination that its favoured program types have diminished to the conclusion that the Prime Time Access Rule is responsible therefor can only have been accomplished by a leap of faith. Nowhere is this more clear than in its setting forth of the basis for the public affairs exemption, in a paragraph which defies paraphrase:

> With respect to public affairs programming, this is not available in significant amount in new syndicated material, although of course there is a substantial amount of such programming produced locally and presented in access time, one of the important benefits of the rule as already mentioned (see par. 15, above and pars. C-5 and C-50). As to the networks, there is a substantial amount of public affairs programming (and similar news documentary material) in prime time on all three networks, but no regularly scheduled material, whereas before the rule both CBS and NBC had regular prime-time programs of this nature, and it is also noted that some such network programming occurs outside of prime time. We conclude, therefore, that the rule constitutes an inhibition on the networks' exercise of this highly important part of their activities ... 47/
>
> Second Report and Order, supra, paragraph 32 (footnote omitted).

47/ With respect to the Commission's conviction that the Prime Time Access Rule inhibits the networks in presentation of public affairs programing, it is interesting to note that the Second Report and Order (paragraph C-43) reflects the fact that at least one network thinks prime time may not be the most appropriate slot for such material: "[CBS'] 60 Minutes program has a substantially larger audience on Sunday at 6 than it formerly did on Tuesdays at 10 p.m." And since issuance of the Second Report and Order, CBS has reportedly announced its determination not to move the program into the access slot which the exemption made available for that purpose. (Needless to say, it will use the exemption, however, for a melange of specials already in prime time, thus like NBC simply expanding its prime time entertainment by one hour without adding anything new.) New York Times, February 13, 1975, page 67.

Apparently the Commission is satisfied that if two circumstances co-exist they may safely be assumed each to be cause of the other. At any rate, no other explanation suggests itself and none is given in the Second Report and Order. This omission is rendered the more peculiar in light of the fact that the 1974 Report and Order, supra, 44 F.C.C.2d 1081, 1134, specifically stated that "the rule may well not be the sole, or even the major, cause of" the diminution in such material.

It would perhaps have been the more surprising if the Commission had attempted to explain how the Prime Time Access Rule caused a diminution in the Commission's favoured programs, since elementary logic suggests the impossibility of the task. The Prime Time Access Rule is wholly content neutral, a point relied on by the Commission in its adoption and this Court in its affirmance. See Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 480. More than this, the rule is also silent on the question of scheduling, leaving it up to each licensee to determine for itself when during the four hours of prime time it would be most suitable to refrain from use of network or off-network material. If, then, favoured programs have diminished, that is because the networks have chosen to offer no programs at all between 7:00 and 8:00, and the stations have chosen neither to utilize satisfactory quantities of nonnetwork programing within the chosen categories during that hour nor to refuse the network feed at some other time in order to employ network or off-network programing in the favoured categories during the 7:00-8:00 p.m. hour.

The only extent to which the Prime Time Access Rule can be held causative in the context of the judgments made is insofar as it permits licensees the meaningful opportunity to make judgments in the first place. In the final analysis, the only reason for adoption of the rule was the fact that, left to their own devices, licensees refused to do so, relying instead on their networks to make programing decisions for them.[48/] It was precisely because the rule liberated licensees from external imposition of the judgments prerequisite to their proper stewardship that this Court found the rule to be itself permissible. See Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 480.[49/] Even if the Commission now finds licensee exercise of that decision making power to reflect poor judgment, its withdrawal or limitation could hardly be viewed as a means of improving the quality of licensee judgment.

In short, the Prime Time Access Rule frees licensees to use their own judgment in program choice. And if the Commission is

48/ In this connection the Commission had stressed in adopting the Prime Time Access Rule that the networks dominated not only prime time but their affiliates as well, making them in some cases "so dependent on national networks that their economic viability ... [turns] on whether they continue to receive revenues from" the network programing precluded by the rule, a situation preventing "proper discharge of their broadcast trusteeships" and emphasizing "the need for Commission action ... to reestablish licensee individuality and responsibility as operable factors in television broadcasting." Order on Reconsideration of Report and Order: Network Television Broadcasting, supra, 25 F.C.C.2d 318, 329-30.

49/ "The Commission has found," explained this Court, "that the wide range of choice theoretically available to licensees is either not in fact available or is not being exercised for economic reasons. It has acted in discharge of its statutory duty in seeking to correct that situation."

troubled by the wisdom of their judgment in exercise of that freedom then it should review their judgment, not withdraw their freedom to employ it. And since that judgment is by definition local, [50/] its review cannot proceed by generalized rule but only through the individual licensing process, to which responsiveness to specific local needs is a precondition. See, e.g., Henry v. F.C.C., 302 F.2d 191 (D.C. Cir), cert. denied, 371 U.S. 821 (1962).

3. The exemptions are not responsive to the problem identified by the Commission.

Assuming that the Commission was correct in its determination that licensee program selection during the time in which licensees are newly freed by the Prime Time Access Rule to make realistic choices of their own programs has functioned to the detriment of their audiences, in that they have programed inadequate numbers of shows in the areas deemed vital by the F.C.C., there is nothing in the chosen remedy which is responsive to this problem. The only extent to which the exemptions alter the status quo in effect under the rule is the extent to which they make it possible for the networks to reassert the control over access time which led to adoption of the rule. Thus if licensee bad judgment is eradicated by the exemption it will be eradicated only because the licensee judgmental function will be suspended, as before the rule.

Moreover, there is nothing in the exemptions which ensures that by permitting an increase in network and off-network programs in the approved areas this increase will not be offset by a concomitant

50/ See 47 U.S.C.§307(b); F.C.C. v. Allentown Broadcasting Co., 349 U.S. 358 (1955).

decrease in such programs from affiliates themselves and from syndicated sources. Indeed, if such an eventuality is not prohibited, it is ensured. Former network material will destroy access material for the simple reasons of market operation which made the off-network corollary to the access rule necessary: nonnetwork programs cannot survive the "insurmountable" competition offered by former network shows, a fact not only responsible for the rule's adoption but also recognized in the present Docket. See Network Television Broadcasting, supra, 23 F.C.C.2d 382, 395; 1974 Report and Order, supra, 44 F.C.C.2d 1081, 1143; Second Report and Order, supra, paragraph 25. And both new and former network shows will drive out nonnetwork competition by the simple and non-economic fact of their occupation of the same time which would otherwise have been available for local and syndicated shows. This result is contradictory on its face of at least one major conclusion in the Second Report and Order itself: that the impetus a fully effective Prime Time Access Rule has provided to local production of public affairs programs is one of the "principal reasons for retaining [the rule] in a form close to" the original version. Second Report and Order, supra, paragraph 60. If public affairs programs now in existence are so influential in the judgment to retain the rule, their sacrifice in order to encourage public affairs programs is not easily comprehensible.

Particularly is this so when the exemption not only does not ensure retention of existing nonnetwork favoured shows but also

does nothing to prevent simple rescheduling of already existing network shows of the preferred types into access time and their replacement elsewhere in the prime time schedule with additional non-favoured programs, a result representing a net loss rather than an even exchange of nonnetwork for network material. 51/

Even if such a counterproductive method of problem solving were not inherently unreasonable, it would be rendered unreasonable by the multiplicity of effective alternatives. Thus, for example, the Commission declined to require clearance on one or more nights of another hour, permitting network recapture of 7:00-8:00; to impose a requirement that networks offer certain types of programs at certain times; to require that stations offer certain types of programs at certain times; or to undertake to examine the performance of stations individually to ensure that their programing in these respects is consistent with their public interest obligations. And in explanation of its refusal, the Commission said simply that "these alternatives would involve the Commission too deeply in day-to-day programming and scheduling decisions." Second Report and Order, supra, paragraph 40.

Since the exemptions themselves, even if legal, constitute an extraordinary intervention in the most basic of program decisions

51/ The probability that just such a result will be achieved is adumbrated by NBC's early announcement of intent to reschedule Disney, now seen on Sunday at 8:00, into access time and replace it with entertainment, thus losing all the local and syndicated shows in all three favoured categories now seen on NBC affiliates between 7:00 and 8:00 (including, ironically, the well regarded local public affairs show of NBC's owned and operated New York affiliate) to permit an action NBC could have taken anyway simply by clearing a different hour on Sunday for nonnetwork material. And CBS has already followed suit. See footnote 47, supra.

-- involving what should be broadcast, when, and by whom -- this reasoning is difficult to accept at face value. The Commission appears to balk at mere procedural intervention for the very same reason that N.A.I.T.P.D. has herein challenged its alternative resort to fundamental substantive intervention in the affairs of licensees. While it is axiomatic that the Commission's discretion extends to election of one procedure rather than another which might appear to serve as well, [52/] it is equally well established that in so doing the agency must so exercise that discretion as to "enabl[e] the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent." Greater Boston Television Corp. v. F.C.C., supra, 444 F.2d 841, 850; see N.A.I.T.P.D. v. F.C.C., supra, 502 F.2d 249, 257. Here, however, the Commission's reasons deviate even from its own expressed intent in taking the action at issue and cannot therefore be found to constitute rational support for that action.

4. The exemptions are in gratuitous derogation of the rule they modify.

Even if the exemptions were an otherwise rational response to a reasonably defined problem, their employment here would be unreasonable since they do violence to the Prime Time Access Rule which could have been avoided by employment of an alternative solution which left access time untouched. See Greater Boston Television Corp. v. F.C.C., supra, 444 F.2d 841, 850. To choose

52/ See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190, 224 (1943).

the only solution which damages the rule is particularly unreasonable in view of the fact that the rule's general impairment through loss of the time devoted to exempt programs is coupled with the built-in inhibition against future development of access programs of the very kinds the Commission has found most crucial. Destruction of any possibility that such programs can come from other voices than those already deemed to have an unhealthy control over the public ear seems more irresponsible still when the Commission has specifically found the rule's operational history both too short and too bloody to permit any determination as to what kinds of programs might develop given the kind of certain future which these exemptions necessarily preclude. See Second Report and Order, supra, paragraph 18. As the Commission has before been cautioned, agency "expertise is strengthened in its proper role as the servant of government when it is denied the opportunity to 'become a monster which rules with no practical limits on its discretion:' Burlington Truck Lines v. United States, 371 U.S. 156, 167 (1962)." Greater Boston Television Corp. v. F.C.C., supra, 444 F.2d 841, 850. The Commission must here be denied that opportunity.

B. The Commission's Admitted Ignorance Of Both The Amount Of Cleared Time Prerequisite To A Viable Prime Time Syndication Industry And The Amount Of Cleared Time Which Will Eventuate From Employment Of The Exemptions Precludes A Reasoned Judgment That They Can Coexist.

The challenged exemptions reinstate the network program monopoly for an undetermined portion of the previously cleared prime time. When the Prime Time Access Rule was adopted, the

Commission's analysis did not stop with the essentially philosophical judgment that action must be taken to defeat the network prime time monopoly and that offering prime time to nonnetwork sources would assist in this effort. The decade of study which went into that rule and its two inseparable companions, the Syndication and Financial Interest Rules, included extensive Congressional input, advice from the Antitrust Division of the Justice Department and years of work by the Commission's own economists, as well as the adversary findings of the parties.

While the Commission itself did detailed studies on a number of directly relevant matters, (e.g. effects of the then proposed rules on affiliates, see Order on Reconsideration of Report and Order: Network Television Broadcasting, supra, 25 F.C.C.2d 318, 328-29), it did not specifically undertake an economic study of the syndication market because a multiplicity of material was already available. See Order on Reconsideration of Report and Order: Network Television Broadcasting, supra, 25 F.C.C.2d 318, 320. The present need for such a study (and see Report and Order: Network Television Broadcasting, supra, 23 F.C.C.2d 382, 401, clearly manifesting such intent) is underscored not only by the fact that such a market now exists during the centrally relevant prime time period but also by the fact that the Commission's present action would inhibit rather than encourage that market, a circumstance under which it invariably did do its own studies when it adopted the rule, as in the case of the rule's economic impact on affiliates.

On the basis of its lengthy research the Commission determined, in presently relevant part, that in order to achieve the stated objectives of its proceeding a rule was required which encouraged development of a healthy syndication industry; that such development required guaranteed access for nonnetwork programs; that such access must be to prime time; that it must be available seven days a week on a regular basis; and that the smallest amount of time which a viable independent syndication industry could be expected to develop around was one full hour a day for which all nonnetwork sources could compete among themselves.

The Commission's only reference to the subject of the requisite size of a viable access market in the present Docket occurs in the Second Report and Order as a response to the urging of N.A.I.T.P.D. and others that the subject must be explored. The Commission's reasoning, in full, was:

> As to the necessity of a full hour of cleared time for the adequate development and health of the industry, this was the conclusion of the 1970 Report and Order in Docket 12782, but the decision contains no particular discussion of the exact amount of cleared time, and there had been no study of the syndication market. Second Report and Order, supra, paragraph 41. 53/

And with respect to the second essential enquiry, the impact of its exemptions on the access market, the Commission simply assumed a conclusion and used it to buttress the conclusion that it makes no difference how much cleared time a viable industry needs. Thus the paragraph just quoted continues:

53/ The Commission appears to have forgotten that it explained on the record the good and sufficient reasons why it did not need to make such a study in 1970. In view of the length of this explanation, it is reprinted as Appendix C hereto, page A4, infra.

> We are still committed to the concept of a substantial access period. The limited modifications adopted at this time simply reflect a desire to mitigate certain undesirable effects which came about as a result of PTAR I. We call attention to the statement in the 1970 Report and Order that it was not our objective to smooth the path for existing syndicators, or to create for them a competition-free enclave (23 FCC 2d 397). Our action here is in line with those concepts. We conclude that the time reduction involved here is not sufficient to impair the opportunity for the growth of a reasonably healthy syndication industry, and that, even if it does represent some small impairment, this is outweighed by the benefit to the public of the resulting programming.
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> Id.

Aside from this general reference to the temporal consequences of its exemptions, [54/] the Commission refers specifically to the effect of each. Thus with repect to the amount of time which will be recaptured for children's programs: "It is our expectation that networks and licensees will not abuse this exception to the rule ...; [55/] with respect to public affairs programming ... we assume that this exemption also will not be utilized to effectively undercut the basic rule"; [56/] and with respect to documentaries, where the existing supply of network and off-network programs

54/ Similar general statements appear at paragraph 34 ("We expect the networks, and licensees in their acceptance of network programs and use of off-network material, to keep such programming to the minimum consistent with their programming judgments as to what will best serve the interests of the public generally."); paragraph 37 ("[I]t is not to be anticipated that these changes will have the untoward results claimed, so as to lessen significantly the advantages flowing from the rule."); paragraph 39 ("We have kept the exemptions narrow so as to avoid any undue incursion into the access period."); and paragraph 47 ("The exemptions have been drawn as narrowly as possible consistent with the interest of the public discussed above, to avoid any unwarranted incursion into cleared time.").

55/ Second Report and Order, supra, paragraph 31.

56/ Second Report and Order, supra, paragraph 32.

awaiting rescheduling into access time apparently precluded even an "assumption" of minimal use, "the benefit to the public from facilitating the presentation [of network and off-network documentaries] outweighs in importance what might be termed an increase in network dominance (to the extent these are network programs) and an incursion into the full availability of 3 hours a night of cleared time for other new material"; [57/] with respect to sports, "there is not enough incidence of runovers to affect the potential market for syndicated programming"; [58/] and with respect to material "related to" the original news exemption no effort was made to assess impact since "this [exemption] is clearly warranted to lessen any impediment to the networks' proper exercise of their journalistic function." [59/]

In sum, the Commission concedes its ignorance of the very economic factors whose initial analysis led it to conclude and

57/ Second Report and Order, supra, paragraph 33. This last reference is a rather telling suggestion that the real issue on the Commission's mind is ensuring a longer network schedule; presumably what is meant is that since the networks now have to place their documentaries in their "own" 3 hours, the exemption will permit the documentaries plus a full 3 hour network prime time entertainment schedule.

58/ Second Report and Order, supra, paragraph 51.

59/ Second Report and Order, supra, paragraph 56. This "minor modification" to the present and unchallenged exemption, for which -- as indicated at pages 16-17, supra -- there is both clear precedent and existing interpretive guidance for networks, is a real "sleeper." On the one hand it presents networks with an impossible definitional task, an unconstitutional attribute it shares with virtually all of the exemptions; but on the other hand it presents an even greater potential operational nightmare to the nonnetwork producer since theoretically, a network could institute a daily program "relating to the day's chosen news story," thus defeating the Prime Time Access Rule completely.

this Court to agree that the Commission's mandate to foster competition [60/] also mandated the Prime Time Access Rule. Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470,479-80. Comparison of the reasoning in the present order with that contained in the order issued last year in this Docket renders inescapable the conclusion that whatever the Commission chooses to do to effectuate its new program preferences will be deemed consistent with the economic imperatives -- whatever they may be -- upon which the rule's continued success depends. Thus last year, in explanation of why loss of the first daily half hour of cleared time would be harmless, the Commission explained that "only about 10% of the stations covered [by the rule] present material which needs the rule's encouragement" and that waiver requests had presented problems which "are not insoluble or terribly difficult" but which would "require some careful adjustments; and in view of the very little benefit accruing from this period to the cause of promoting really new non-network programming, we conclude that the need for such 'fine tuning' should be dispensed with." 1974 Report and Order, supra, 44 F.C.C.2d 1081, 1132-33.

60/ Both the existence of that mandate and the fact that it may not be evaded for any reason -- and certainly not just to facilitate pursuit of some newly appealing objective to redesign the present network prime time schedules -- have been clear since long before the Prime Time Access Rule was adopted (See F.C.C. v. RCA Communications, Inc., 346 U.S. 86,94 (1953); National Broadcasting Co.,Inc. v. United States, 319 U.S. 190, 218 (1943); F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940); 47 U.S.C. §§313, 314, 303(g)),as this Court has twice recognized. See N.A.I.T.P.D. v. F.C.C., supra, 502 F.2d 249, 256; Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 479.

In the Second Report and Order (paragraph 59) the Commission explains its determination not to abandon this same half of cleared time by stating that:

> [W]e find on further consideration that a general increase in network programming, or opportunity for off-network programming on a general basis, is not warranted in light of the importance of the objectives of the rule. ... [I]t appeared to us earlier that there is something to be said for increasing diversity by permitting off-network material in addition to the news and game shows which generally fill this period Monday-Friday. As a short-run proposition, this might be true. However, for the longer term, we conclude that this would have too much of an impact on the availability of cleared prime time for the development of new material, and that it might tend to increase the use of stripped game shows in the second half-hour of prime time.

This passage reflects yet again the fact that the controlling considerations in the Commission's mind are unrelated to competition, having to do only with what programs are produced when and by whom. Insofar as it can be read to constitute an economic judgment, one is presumably to conclude that loss of half the time made available by the original rule would render it inoperative. However, even if such an assertion could be conceived to constitute a reasoned judgment that at least half the total time must be retained, it neither faces the questions whether that time must be available daily, regularly and certainly, as was found to be the case in 1970 nor the second basic question concerning the present exemptions: whether they will in fact use less than half of access time.

This Court has already once cautioned the Commission about its cavalier approach to economic analysis and specifically explained that the Commission is of course free to adopt whatever

economic conclusions it deems mandated by the record "so long as it fully explains its reasons for so doing." N.A.I.T.P.D. v. F.C.C., supra, 502 F.2d 249, 256.

Here the Commission has in no meaningful sense adopted conclusions in the first place and, to the extent that it has done so, the reasons given therefor have nothing to do with the subject matter of the conclusions. Absent a meaningful expression of relevant reasons for the judgments on which adoption of the exemptions is based, the challenged order must be reversed both because the Court cannot "consider the strands of public interest identified by the Commission," rendering it manifestly impossible for the Court "to determine whether the Agency's delineation is contrary to law," [61] and because to the extent that the Commission's reasons can be discerned they "deviate" reversibly "from or ignore the ascertainable legislative intent" [62] the Prime Time Access Rule was adopted to effectuate.

C. The Commission Has Articulated No Public Interest Justification For Its Judgment That The Novel Policy Of Favouring Programs By Type Is Of Greater Importance Than The First Amendment Mandate, Which The Prime Time Access Rule Effectuates, To Stimulate Programs From Diverse Sources.

Although the Commission suggests tepidly from time to time that the exemptions are wholly consistent with the rule, it indicates with rather more warmth both that the exemptions are in

61/ WAIT Radio v. F.C.C., supra, 459 F.2d 1203, 1207.

62/ Greater Boston Television Corp. v. F.C.C., supra, 444 F.2d 841, 850.

derogation of the rule and that they are so intended. It does so in two ways: first by making clear that the exempt categories were selected not just because the Commission prefers these kinds of programs but also because the Commission prefers the way the networks make these kinds of programs; 63/ and second by insisting that any cognizable damage to access production will be limited to the time lost to nonnetwork sources, since direct network and off-network competition will damage only the kinds of programs which networks do better, thus leaving syndicators free to do other, presumably more suitable, kinds of programs.

The first of these points is conveyed by such findings as the following, discussing public affairs and documentary programs:

> Bearing in mind the tremendous resources which the networks have for such programming, we conclude that the facilitation of such material from network sources outweighs the claimed disadvantage. Second Report and Order, supra, paragraph 38.

Likewise, in discussion of extending the exemption for on-the-spot and fast-breaking news to cover "related" material: "[T]his is clearly warranted to lessen any impediment to the networks' proper exercise of the journalistic function." Second Report and Order, paragraph 56. And as to children's programs:

63/ A propos of the issue of whether taste runs with the office or the office holder, it is interesting to note that the 1970 Commission, which wholly eschewed this entire area as beyond both its mandate and its competence, did observe in passing that those few independently produced programs found in prime time "were generally considered by critics to be bright spots in network schedules." Report and Order: Network Television Broadcasting, supra, 23 F.C.C. 2d 382, 411.

> [O]ur concern here is with the numerous children's special programs presented by the networks, generally starting at 8:00 p.m. E.T. or later under the network schedules which have resulted from the rule, as well as with the potential for regular [network] programming significant in this area.
>
> Second Report and Order, supra, paragraph 30.

The second and related conviction that nonnetwork program sources are beneficial only insofar as they produce programs not available from networks, and that the exemptions are therefore nondetrimental even if they destroy the potential for nonnetwork production of exempt program types, is conveyed by such explanations and conclusions as the two which follow:

> ... There will continue to be excluded from access time those programs which make up the bulk of present and former network programming -- entertainment programs such as drama, comedy and variety -- thus leaving the field for the development of such material to eligible access-period sources.
>
> Second Report and Order, supra, paragraph 39.
>
> o o o
>
> Thus, we have drawn the exemption so as to exclude the possibility of its being used for network game shows (since game shows are plentiful in access time), and to exclude the whole range of entertainment such as drama, comedy and variety, where there appears a potential for impact on the development and success of material which might otherwise develop for access use.
>
> Second Report and Order, supra, paragraph 47.

Moreover, even had the Commission not thus made manifest its intent to ensure that certain kinds of programs came from network rather than independent sources, the exemptions themselves ensure achievement of such a result. Even assuming the Commission is otherwise empowered so to elevate its new policy of encouraging preferred programs above the policy of creating source diversity and eliminating the network stranglehold on prime time, it is well

settled that some reason must be offered for depreciating a policy hitherto deemed paramount. The bland and opaque assurance that "the public interest is on the side of the programs and not their place of origin" [64/] does not satisfy the requirement, prerequisite to judicial review, that the Commission explain how "alter[ation of] its past interpretation" or "overturn[ing of its] past administrative rulings and practice" is justified by virtue of "new developments or in light of reconsideration of the relevant facts and its mandate." [65/]

These principles apply with especial vigour where, as here, that past interpretation and those past rulings have also been found reasonable by this Court, [66/] and where that precedent has been under siege ever since. As the Commission has been reminded under somewhat analogous circumstances:

> Judicial vigilance to enforce the Rule of Law in the administrative process is particularly called upon where, as here, the area under consideration is one wherein the Commission's policies are in flux. An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.
>
> Greater Boston Television Corp. v. F.C.C., supra, 444 F.2d 841, 852 (citations omitted).

64/ Second Report and Order, supra, paragraph 33.

65/ American Trucking v. A.T. & S.F. Ry. Co., 387 U.S. 397, 416 (1967).

66/ See Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 480.

The Commission has here been, at best, "intolerably mute." Id. And in view of this Court's specific reminder in this very case that the Commission "must identify the public interest basis for its actions," [67] it appears clear that the continuing failure to do so is not the result of correctable oversight but of reversible error caused by the fact that there are no reasons for the asserted public interest judgment.

D. Administration Of The Challenged Exemptions Will Inhibit Broadcast Speech And Undermine Licensee Responsibility.

The challenged exemptions withdraw from the licensee in significant measure the right to make or select its own programing, especially in those categories which are in the same order identified as most crucial to performance of the licensee's public interest function. And both network and licensee are not only bound by the Commission's prior announcement of the types of programs they may use but also bound to guess at their peril whether particular programs they may choose to use will be deemed by the Commission to come within the definitions.

It has already been demonstrated that the Commission's assertion, based solely on its own wholly unexplained judgment, of what kinds of programs best serve the public interest "'sweep[s] ... widely and ... indiscriminately' across protected freedoms" and is therefore impermissible under any circumstances and for any reason. Banzhaf v. F.C.C., supra, 405 F.2d 1082, 1095; and that the challenged action is independently illegal because it contra-

67/ N.A.I.T.P.D. v. F.C.C., supra, 502 F.2d 249, 257 (emphasis added).

venes the statutory allocation of decision making functions as among itself, its licensees and the networks.

Even were the challenged exemptions not thus doubly defective at the outset as a matter of law, the administrative infirmities implicit in their vagueness (even assuming that does not render them facially unconstitutional) are sufficient to make the entire scheme reversibly unreasonable. The Second Report and Order at no time even defines two of its exempt categories (public affairs programs and programs "related to" the previously exempted and now unchallenged categories of "on-the-spot" and "fast-breaking" news coverage). A documentary is defined, for purposes of exemption, as "any program which is non-fictional and educational or informational" but if such a documentary has a format wherein "the information is used in a contest among participants" or which "relat[es] to the visual entertainment arts (stage, motion pictures or television) where more than 50% of the program is devoted to the presentation of entertainment material itself," it will not be entitled to the exemption available to all other documentaries. See Appendix B hereto, 47 C.F.R.§73.658(k)(1) and NOTE 2, A2-A3. A children's program is defined as a program "primarily designed for children aged 2 through 12" (Id.). Since the Commission specifically notes both that "we would not necessarily regard all programs so considered by some as falling within this category" [68/] and that a

68/ Second Report and Order, supra, paragraph 30.

particular program which it last year thought was a "family" program is now a "children's" program, [69/] it is obvious that this determination is neither considered clear by the Commission nor within the competence of a program's producer or broadcaster to apply. And as to the documentary with more than 50% entertainment, one shudders at the thought of producer, broadcaster and Commission applying their stop watches one after the other to verify the count.

It is already clear from the past year's experience under one of the Commission's blanket and strongly opposed grants of a waiver, now codified in the sports runover exemption, both that the Commission will indeed be making such judgments and that its manner of reaching them will remain a professional secret. Thus the Second Report and Order finds (a finding, by the way, which no access or local producer of weekend programs will dispute as a practical experiential fact, although that is a very different matter), that the networks have already "abused" this exemption. Second Report and Order, supra, paragraph 51. In view of the fact that both the scheduling of access time and the scheduling of network telecasts are within network discretion, it is difficult to see how any overrun into access time can ever be beyond network control, but since the Commission believes that some which have occurred are and others are not, the fact remains that networks and presumably also the licensees carrying their telecasts will have to understand how

69/ Second Report and Order, supra, paragraph 31, footnote 25.

it is possible to have an exempt overrun and be sure the ones they have are of this variety.

This matter of whether it is to be the network or the affiliate taking its feed or both (and if so how and in what order and with what consequences) who will be responsible in the first instance for guessing whether something is exempt also raises fascinating administrative possibilities, unless, of course, the Commission means all its warnings to be merely precatory, in which case only those who try in good faith to comply will suffer and all others can program what they please with impunity. Impunity was indeed the consequence of the "abuses" of the sports waiver -- if they were not indeed rewarded by grant, in the same order which found such abuses, of a "lifetime waiver."

Assuming that the Commission does mean or is understood to mean its dire warnings concerning non-"abuse" of these incomprehensible exemptions, however, it is inevitable that their use can hardly comport with the expressed motivation behind their adoption, since the necessary consequence of a wrong guess is violation of the Prime Time Access Rule. Unless affected entities wish to submit their program ideas for voluntary prior censorship, they will therefore presumably have to censor themselves along the lines of what they think it is the Commission would like to see them doing. Thus even if the exemptions were inoffensive on their face, the response of licensees and networks will necessarily lead to "the rise of an

enlargement of government control over the content of broadcast discussion" [70/] with the result that the programs broadcast under their aegis "will reflect the Commission's selection among tastes, opinions and value judgments, rather than a recognizable public interest." Banzhaf v. F.C.C., supra, 405 F.2d 1082, 1096.

E. The Challenged Exemptions Conditionally Revoke A Rule Whose Revocation The Same Order Finds To Contravene The Public Interest.

As has been exhaustively documented in previous arguments by copious citations to and quotations from the Second Report and Order, the Commission's express purpose in adopting the challenged exemptions was to ensure presentation of specified types of programs from network and off-network sources during the time presently cleared for nonnetwork programs. The Second Report and Order also specifically declines to impose any limitation on the extent to which the exemptions may be used, on the ground that licensees must be left free to make that determination as in their judgment the public interest requires. See Second Report and Order, supra, paragraphs 34-35.

If, as must be presumed, the Commission can be taken at its word in intending to leave this matter, like all other program choices, to the discretion of the licensees, then it must also be presumed that the Commission's review thereof will be limited to scrutiny of each licensee's reasonable, good faith efforts to

70/ Columbia Broadcasting System, Inc. v. D.N.C., 412 U.S. 94, 126 (1973).

ascertain and meet the needs of its community. Moreover, in view of both the uniquely delicate nature of the judgments here at issue and the extreme ambiguity of the regulatory language whose misinterpretation would put a licensee in direct violation of the Prime Time Access Rule, it must further be assumed that the Commission would resolve all ambiguities in favour of the licensee. See discussion of 47 U.S.C.§315 at pages 16-17, supra; Banzhaf v. F.C.C., supra, 405 F.2d 1082, 1095.

Under such circumstances of necessary Commission restraint in overruling license judgments, and given the Commission's own specific finding that use of these programs at these times is of an importance overriding even the Constitutional imperatives underlying the Prime Time Access Rule, it seems clear that either fear of disapproval or desire for approval would lead to an enthusiastic licensee response (quite aside from the intrinsic economic appeal of off-network material and the effects of the inherent coersive nature of the network-affiliate relationship in licensee acceptance of new network programs). Moreover, inasmuch as each licensee's judgment is an isolated, local determination, the Commission's promise to be alert for abuses is an empty one; the combined effect of multiple independently defensible local judgments on the overall operation of the Prime Time Access Rule is effectively indistinguishable from multiple abuses.

Implicit in all these facts is a real possibility that the exemptions will sufficiently diminish the access market as to wholly

swallow up the rule. Since the Commission has categorically deemed the rule's continuation to be required at this time -- except for "minimal incursions" -- the agency's demonstrated helplessness to ensure that state of affairs means that at a minimum the exemptions put in jeopardy the rule which this same order purports to reaffirm. Taking the most charitable view of matters, even if the stated intent of the exemptions is itself legitimate, "good and sufficient reasons ought to be given for robbing Peter to pay Paul." Northeast Airlines, Inc. v. C.A.B., 331 F.2d 579, 588 (1st Cir. 1964). And given the fact that not only the practical effect of these exemptions, but also their individual justifications, are essentially in direct conflict with the effects and the justifications given for the Prime Time Access Rule, "with no seeming recognition that [they were] a complete contradiction of the apparent tenor of, and, indeed, express statements in," the Commission's opinion, it could as fairly, if less charitably, be said that adoption of these exemptions "is an example of administrative fiat, which, frankly, shocks me." Northeast Airlines, Inc. v. C.A.B., supra, 331 F.2d 579, 589 (Aldrich, C.J. concurring).

F. The Implication That The Commission Has Reserved Judgment On The Exemptions' Effect Upon First Amendment And Public Interest Values Cannot Delay The Impact Of Its Actions.

The Second Report and Order manifests a consistent purpose of evading or postponing the basic judgments which alone could constitute a reasonable predicate for the action here taken. Once having adopted the challenged exemptions, because "the public has a right

... to these types of programming" which "the rule has had the effect of limiting," and "the public interest is better served by allowing" them "to appear to some extent in cleared time," [71/] the order simply delegates to licensees and networks the determination of when, whether and for what programs the exemptions should be utilized.

This purpose of evading a specific public interest judgment concerning an action it has nevertheless taken, is further reflected in the exclusively negative terms in which the Commission refers to use of the exemptions throughout the Second Report and Order. Thus, with respect to one or another of the exemptions, it is "expected" that it not be "abused" (paragraph 31), "assumed" that it "will not be utilized to effectively undercut the basic rule" (paragraph 32); "expected" that use will be kept "to the minimum consistent with [network and licensee] programming judgments as to what will best serve the interst of the public generally" (paragraph 34); and so on. The not unrelated purpose of postponing a specific public interest judgment is reflected in an apparent effort to create a "too soon to tell" atmosphere by leaving everything in the hands of others, while speaking reassuringly of "minimal reduction of time" (paragraph 37); "minimum incursion" (paragraph 38); "small impairment" to the syndication market (paragraph 41); "not a serious enough problem" (paragraph 51); and so on. And finally the Commission promises to "re-visit" its exemptions if their use reflects their impropriety (paragraph 34).

71/ Second Report and Order, supra, paragraph 29.

In all of the opinion there is not one affirmative statement. Even the unexplained assertions that the action serves the public interest are negative, the exemptions being required because without them the favoured programs are "not available in significant amounts" (paragraph 32); networks are "inhibited" (paragraph 32); the rule presents "obstacles" to licensee service (paragraph 33); and so on. Indeed in the entire discussion the only positive statement is that NBC has an eligible children's program (paragraph 31, footnote 25), although as to children's programs generally, "we would not necessarily regard all programs so considered by some as falling within the scope of this exemption." (Paragraph 30).

However, this passive-negative style of exposition cannot obscure the fact that in leaving judgments fundamental to its own function up to the regulated industry the Commission has both failed reversibly to "identify the public interest basis for its action" [72/] and taken an affirmative, and affirmatively improper, action. See Calvert Cliff's Coordinating Committee, Inc. v. A.E.C., supra, 449 F.2d 1109, 1119. The Constitutional improprieties of the action taken here are likewise not to be evaded by equivocation. And most especially are they not to be evaded by euphemistic references to the fact that the judgment whether to utilize the exemptions will be reached as part of each licensee's public interest responsibilities. See Anti-Defamation League v. F.C.C., 403 F.2d 169, 172 (D.C. Cir. 1968), cert. denied, 394 U.S. 930 (1969). Whether or not

72/ N.A.I.T.P.D. v. F.C.C., supra, 502 F.2d 249, 257.

the Commission engages in specific acts of censorship in the first instance, its licensees will ultimately force it into that position:

> Talk of 'responsibility' of a broadcaster in this connection is simply a euphemism for self-censorship. It is an attempt to shift the onus of action against speech from the Commission to the broadcaster, but it seeks the same result -- suppression of certain views and arguments. Since the imposition of the duty of such 'responsibility' involves Commission compulsion to perform the function of selection and exclusion and Commission supervision of the manner in which that function is performed, the Commission still retains the ultimate power to determine what is and what is not permitted on the air. So this formulation does not advance the argument either constitutionally, ideologically or practically. Attempts to impose such schemes of self-censorship have been found as unconstitutional as more direct censorship efforts by government. Smith v. ... California, 361 U.S. 147 ... (1959); Bantam Books v. Sullivan, 372 U.S. 58 ... (1963); Washington Post v. Keogh, 125 U.S.App.D.C. 32, 365 F.2d 965 (1966), cert. denied, 385 U.S. 1011 ... (1967).
>
> Id.

The conclusion seems inescapable in this case that the Commission attempted to evade appellate repudiation of its action on Constitucional groundsby endeavouring on the one hand to "shift the onus of [its] action" to licensees (Id.) and on the other by declining to articulate any legitimate regulatory purpose which might conceivably justify the unprecedented intrusion into licensee programing functions which the exemptions constitute. Commission "action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion" that the public interest mandates preferential treatment for the exempted programs. Bates v. Little Rock, 361 U.S. 516, 525 (1960). But delegation of the forbidden program selection function was as unconstitutional as would have been its performance by the Commission; [73/] and failure to identify a "sub-

73/ Anti-Defamation League v. F.C.C., supra, 403 F.2d 169, 172.

ordinating" regulatory interest justifying the intervention in licensee freedom and the derogation of the Constitutionally mandated purpose of the access rule, is as fatal as would have been identification of an improper purpose. 74/ The Commission has twice failed, and this time despite this Court's caution regarding the first failure, 75/ to offer a reviewable reason for its efforts to erode the access rule in furtherance of its own program preferences. It must therefore be concluded that no such reason exists and the continuing effort to achieve an unlawful and unconstitutional purpose summarily reversed.

G. The Effective Date Provision Is Administratively Irrational For The Same Reasons And To The Same Extent As The Exemptions To Which It Relates.

The September effective date adopted for the present rules is virtually identical to that adopted for the proposed 1974 rules and is similarly justified. It is, however, considerably less reasonable under the circumstances.

On February 6, 1974 the Commission released its 1974 Report and Order, basing its effective date on the assertions that adequate notice had been afforded affected parties "to make plans and preparations in light of the fairly small changes"; and that "the public interest is served by making improvements in any rule effective at a reasonably early date." 1974 Report and Order, supra, 44 F.C.C.2d 1081, 1145.

74/ Bates v. Little Rock, 361 U.S. 516, 525 (1960).

75/ N.A.I.T.P.D. v. F.C.C., supra, 502 F.2d 249, 257.

On January 17, 1975 the Commission released the order on review, basing its effective date on the assertions that "the changes adopted herein constitute less of an incursion into available access time (particularly in light of our admonition of network and licensee restraint) than" the 1974 proposal; "the public interest dictates that the new modifications become effective at an early date because" the rule changes proposed "will best serve the public interest"; and "parties to this proceeding have been on notice as to the specific changes adopted" since issuance on November 15, 1974 of a Public Notice (J.A.082) concerning staff writing instructions. Second Report and Order, supra, paragraph 64. The Commission noted that the effective date question is "important, particularly since the only actual holding" of this Court on review of the 1974 Report and Order "was that we had erred in making the changes effective in the fall of 1974." Second Report and Order, supra, paragraph 63. The Commission noted that "many proponents of the rule" suggested that the same 16 month lead time allowed the networks in 1970 was required (Id.) and stated that "[w]e respectfully disagree." Second Report and Order, supra, paragraph 64.

In short, the Commission's "reasons" for its effective date were identical to those offered last year except that unlike last year absolutely no discussion or explanation was offered whatsoever in support of the conclusion that the public interest mandated retroactive effectuation; unlike last year the Commission did not in the same order find the access rule in its original form an unjusti-

fiable restraint but rather readopted it; and unlike last year the Commission had before it a ruling of this Court instructing it as to the settled proposition that it "must identify the public interest basis for its actions," [76/] explaining the appropriate factors for consideration in the case of an effective date with retroactive effects, and specifically ruling the 1974 order's effective date to be unreasonable for reasons given.

The Commission's present ruling wholly ignores each and all of the foregoing factors, save only the ultimate ruling, which it finds inapposite because the changes made here are smaller and because the parties had two months more notice this year. The effective date provision is accordingly unreasonable on its face for want of a stated public interest basis and for failure to consider the question of reasonable notice in light of its retroactive effect. This Court need not, however, restrict itself to remand. The Commission has had two opportunities to consider this same question, once with the guidance of its own precedent and once with full instructions from this Court. Its failure to correct the procedural defects of last year's ruling is part and parcel of the error of the other provisions of the Second Report and Order, reflecting not an inadequacy of decision writing but the reversible irrationality of the decision itself, as has been amply documented in the preceding arguments.

Just as the Commission has wholly failed to come to grips with the effects of its exemptions on the Prime Time Access Rule,

76/ N.A.I.T.P.D. v. F.C.C., supra, 502 F.2d 249, 257.

on the Constitutionally protected freedoms of licensees and networks and on the licensing scheme of the Act, so too has it failed to recognize the ultimate issue before it with respect to an appropriate effective date. That issue is not the private equities of the parties affected by this ruling but the effect of the Commission's treatment of those parties on the operation of the access rule. That question the Commission has categorically and consistently evaded. Its only effort here is to answer objections to what it has already decided to do. Thus it notes and ignores the "many comments" advising longer lead time [77/] finding it unnecessary because the changes are smaller than last year, and presumably therefore (although the Commission does not explain) will have less impact on independent producers. Assuming that were true, however (although in fact the Commission can have no idea), it ignores the public interest aspect of the matter: if the changes are smaller then more syndicated programs will be needed, rendering the public consequences of any private injury all the greater. The effective date provision, in short, is administratively irrational for the same reasons and to the same extent as the exemptions to which it relates.

77/ N.A.I.T.P.D. v. F.C.C., supra, 502 F.2d 249, 257.

CONCLUSION

For the reasons stated above, the petitioner respectfully submits that for this Court "to remand would be an idle and useless formality" and in light of the history of this proceeding would "convert judicial review of agency action into a ping-pong game." NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766-67, footnote 6 (1969)(Opinion of Fortas, J.). "There is not the slightest uncertainty" that the Commission is incapable of conducting a proceeding that will lead to lawful amendments of the Prime Time Access Rule; "it would be meaningless to remand." Id. The Commission's judgment should be reversed and the programing categories should be set aside.

Respectfully submitted,

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21 February 1975

APPENDIX A

Text Of Original And Presently Effective Prime Time Access Rule (47 C.F.R. §73.658(k))

(k) *Prime time access rule.* (1) No television stations, assigned to any of the top 50 markets in which there are three or more operating commercial television stations, shall broadcast network programs offered by any television network or networks for a total of more than 3 hours per day between the hours of 7 p.m. and 11 p.m. local time, except that in the central and mountain time zones the relevant period shall be between the hours of 6 p.m. and 10 p.m. local time.

(2) For the purpose of subparagraph (1) of this paragraph, network programs shall be defined to exclude special news programs dealing with fast-breaking news events, on-the-spot coverage of news events, and political broadcasts by legally qualified candidates for public office.

NOTE: See also footnote 35, Report and Order, 35 F.R. 7422, for application of this paragraph to certain sports events.

(3) The portion of the time from which network programing is excluded by subparagraph (1) of this paragraph may not after October 1, 1972, be filled with off-network programs; or feature films which within 2 years prior to the date of broadcast have been previously broadcast by a station in the market.

(4) The top 50 markets shall be determined on an annual basis as of September 1 according to the most recent American Research Bureau prime time market rankings (all home stations combined) throughout the United States.

(5) Nothing in this paragraph shall be construed to apply to educational, noncommercial, or public broadcasting station licensees in their use and exhibition of program materials supplied through one or more noncommercial, educational, or public broadcasting television network systems.

NOTE: For stations in the mountain time zone, network programs broadcast in excess of 3 hours during prime time in any evening shall not be counted, where: (1) The program is a sports event or other program broadcast simultaneously on the network throughout the 48 conterminous States; and (2) the station broadcasts no other network material (including "pre-game shows") during prime time the same evening.

APPENDIX B

Text Of Proposed 1975 Version Of Prime Time Access Rule (47 C.F.R. §73.658(k))

Effective September 8, 1975, §73.658(k) of the Commission's Rules, the prime time access rule, is amended to read as follows:

§73.658 Affiliation agreements and network program practices.

* * * * *

(k) Effective September 8, 1975, television stations owned by or affiliated with a national television network in the 50 largest television markets (see NOTE 1 to this paragraph) shall devote, during the four hours of prime time (7-11 p.m. E.T. and P.T., 6-10 p.m. C.T. and M.T.), no more than three hours to the presentation of programs from a national network, programs formerly on a national network (off-network programs) or feature films which have previously appeared on a network: provided, however, That the following categories of programs need not be counted toward the three-hour limitation:

(1) Network or off-network programs designed for children, public affairs programs or documentary programs (see NOTE 2 to this paragraph for definitions).

(2) Special news programs dealing with fast-breaking news events, on-the-spot coverage of news events or other material related to such coverage, and political broadcasts by or on behalf of legally qualified candidates for public office.

(3) Regular network news broadcasts up to a half hour, when immediately adjacent to a full hour of continuous locally produced news or locally produced public affairs programming.

(4) Runovers of live network broadcasts of sporting events, where the event has been reasonably scheduled to conclude before prime time or occupy only a certain amount of prime time, but the event has gone beyond its expected duration due to circumstances not reasonably foreseeable by the networks or under their control. This exemption does not apply to post-game material.

(5) In the case of stations in the Mountain and Pacific time zones, on evenings when network prime-time programming consists of a sports event or other program broadcast live and simultaneously throughout the contiguous 48 states, such stations may assume that the network's schedule that evening occupies no more of prime time in these time zones than it does in the Eastern and Central time zones.

(6) Network broadcasts of an international sports event (such as the Olympic Games), New Year's Day college football games, or any other network programming of a special nature other than motion pictures or other sports events, when the network devotes all of its time on the same evening to the same programming, except brief incidental fill material.

NOTE 1. The top 50 markets to which this paragraph applies on the 50 largest markets in terms of prime time audience for all stations in the market, as listed each year in the Arbitron publication Television Market Analysis. This publication is currently issued each November, and shortly thereafter the Commission will issue a list of markets to which the rule will apply for the year starting the following September.

NOTE 2. As used in this paragraph, the term "programs designed for children" means programs primarily designed for children aged 2 through 12. The term "documentary programs" means programs which are non-fictional and educational or informational, but not including programs where the information is used as part of a contest among participants in the program, and not including programs relating to the visual entertainment arts (stage, motion pictures or television) where more than 50% of the program is devoted to the presentation of entertainment material itself.

APPENDIX C

1970 Commission Statement Re Economic Study Of Syndication Market

It is true that the Commission did not conduct an economic study of the syndication market. However, as above stated, it granted delay of this proceeding on two occasions for substantial periods of time, at the request of the networks, to enable such studies to be prepared by Arthur D. Little Company and made available to the Commission and all parties to the proceeding. In seeking these delays the networks pleaded that no economic study had been made and that such studies were essential. These reports were comprehensive in nature and were presented by the networks as objective studies by disinterested economic experts.

While in many instances the inferences and conclusions drawn by the networks and the Arthur D. Little Company itself did not appear to be necessary or appropriate inferences from the data, these reports provided the Commission with a broad and meaningful factual basis for an understanding of the situation in television network program and syndication markets and the probable impact of its rules. Indeed the information and data contained in the Little Report when properly analyzed and considered, fully support most of the tentative conclusions which resulted from the Program Inquiry and which were set out in the Commission's Notice of March 1965. Much additional information was contained in the comments filed by the networks and others bearing on the present state of the economics of television program production and marketing. The information and data thus submitted were carefully studied by the Commission, and a large part of the Commission's Report and Order, most particularly that part dealing with the syndication market, relies very heavily on the data contained in the Little studies. In view of these facts, there would appear to be no reason why this proceeding should be further delayed to conduct an administrative conference or to permit the Commission to make or procure further economic studies and analyses of these already well-plowed fields. The Commission is satisfied that through the Little Reports, the comments, letters from stations and the entire record, it has ample information before it to permit informed judgments regarding the questions -- economic and otherwise -- presently before it in this matter.

Order on Reconsideration of Report and Order: Network Television Broadcasting, supra, 25 F.C.C.2d 318, 320-21.

CERTIFICATE OF SERVICE

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